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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 52, Original

UNITED STATES OF AMERICA,

Plaintiff,

-v-

STATE OF FLORIDA,

Defendant.

MEMORANDUM IN OPPOSITION TO MOTION BY THE UNITED STATES TO DISMISS THE COUNTERCLAIM AND DENY THE DEMAND FOR JURY TRIAL FILED BY THE STATE OF FLORIDA

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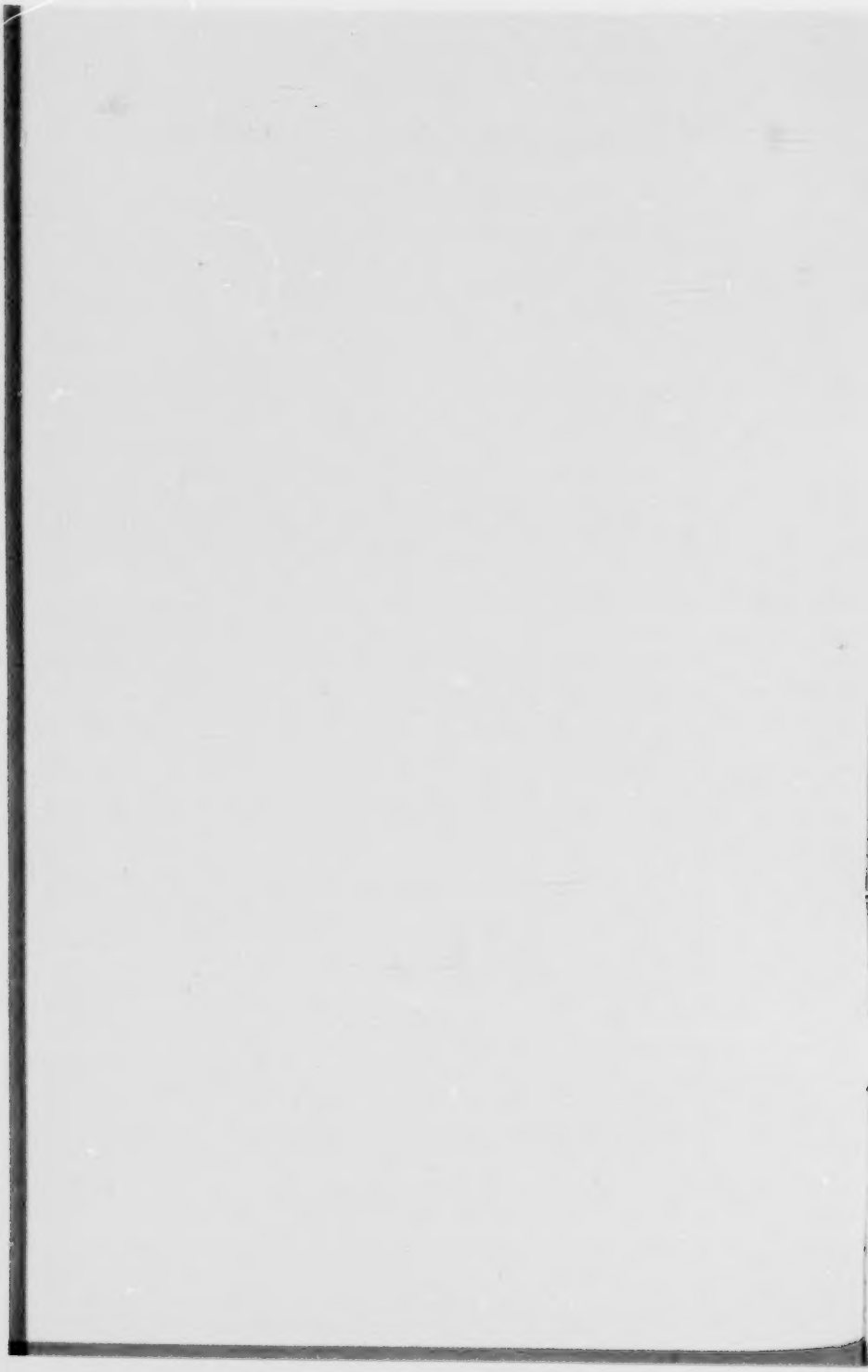

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INTRODUCTION

The Plaintiff, United States of America, has moved to dismiss the counterclaim herein filed by the defendant-counterclaimant, State of Florida. The counterclaim basically alleges that the Congress conveyed title to the submerged lands in question to the State of Florida in 1868 and that the United States is now seeking to take said lands without just compensation in violation of the Fifth Amendment. The United States has moved to dismiss

the counterclaim and to strike the demand for jury trial on the ground, inter alia, of its sovereign immunity.

The Defendant-counterclaimant (hereinafter referred to as "counterclaimant") initially wishes to emphasize what issues are not presented in this case with reference to the doctrine of sovereign immunity. First it should be made clear that counterclaimant does not contest the doctrine of sovereign immunity as it relates generally to tort or contract actions brought by private persons or entities against a government. This case involves an action by one "sovereign" against another on the ground of an alleged constitutional deprivation.

Moreover, counterclaimant does not even advance (nor do the facts of this case present a foundation for presenting) the question of sovereign immunity in an action initially filed by a private person, or even a State. This case concerns the right of a State to present its constitutionally-based claim as a counterclaim in an action instituted by the United States.

Finally, it should be kept foremost that counterclaimant does not even argue the right to advance "unrelated" constitutionally-based counterclaims. The counterclaim in this case concerns the same subject matter as the initial claim. See Rule 13(a), Federal Rules of Civil Procedure (compulsory counterclaims).

Counterclaimant thus submits that the following issue with reference to sovereign immunity is presented by the motion to dismiss, filed by Plaintiff:

WHETHER THE UNITED STATES MAY PLEAD SOVEREIGN IMMUNITY IN A SUIT AGAINST A STATE TO A COUNTERCLAIM ALLEGING A CONSTITUTIONAL VIOLATION AND DEALING WITH THE SAME SUBJECT MATTER AS THE ORIGINAL CLAIM?

I. ARGUMENT ON SOVEREIGN IMMUNITY

A. Sovereign Immunity Should be Abolished

> "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." O. W. Holmes, "Path of the Law," 10 Harvard Law Review 457, 469 (1897).

The doctrine of sovereign immunity was transplanted in our young republic from the early feudal days of England when no baron or lord was subject to suit in his own court. Eventually the doctrine became intertwined with the "divine right of kings" and was predicated on the fact "the king could do no wrong" (at least in this world). Various principles were later advanced in support of the doctrine, the foremost of which was the dogmatic assertion that the sovereign could not be held to answer for a violation of the law the sovereign itself had created (even though this latter proposition appears to

be of doubtful validity, in England at least, after the signing of the Great Charter at Runnymeade). See United States v. Lee, 106 U.S. (16 Otto) 196 (1882).

The vestigial remains of this corollary of the "divine right of kings" were swiftly (albeit unexplainedly) applied by American courts [aside from this Court's abortive demise of it in Chisolm v. Georgia, 2 Dall. 420 (1793)], with a dogmatic fervor, prompted, no doubt, chiefly by the imminent bankruptcy of the State and national governments in the days following the Revolution. See Watkins, The State As a Party Litigant, 52-54(1927).

The legal justification for this blind adherence to the archaic past never really was forthcoming, since "[t]o the Constitution of the United States the term sovereign, is totally unknown." Chisolm v. Georgia, 2 Dall. 420, 454 (1793) (Wilson, J.). Almost a century after Chisolm this Court again found itself at a loss to provide a legal justification for continued adherence to the doctrine, when it stated:

> "What were the reasons which Forbade that the King should be sued in his own court and how do these reasons apply to the political body corporate which we call the United States of America?
>
> ***
>
> "As we have no person in this Government who exercises supreme executive power or performs the public duties of a sovereign, it is difficult to

> see on what solid foundation of principle the exemption from liability to suit rests." United States v. Lee, 106 U.S. (16 Otto) 196, 206 (1882).

Even more important than the utter dearth of legal principles to support the doctrine generally are the compelling legal principles which call for its abolition in those instances wherein a State is alleging a constitutional violation on the part of the United States. Here any justification for continued adherence to the doctrine totally disappears since, unlike in feudal England where the law was the creature of the sovereign, "[t]he United States is entirely a creature of the Constitution," Reid v. Covert, 354 U.S. 1, 5-6 (1957) and all branches of national (as well as State) government are subordinate to it. Id.

Simply stated, under our system of government, it is the constitution which is the "sovereign" (until altered by the people). It is the constitution from which the power to create all laws flow. It is from the constitution (not the king) that this Court derives its authority to sit.

If there is any principle in our nation, where "no man is above the law," which should truly be considered as axiomatic, it is that "no government is above the constitution." This all-transcending document "is a law for rulers and people." Ex Parte Milligan, 71 U.S. (4 Wall.) 281, 294 (1866).

Illustration of this principle is found in those early cases wherein States, when

sued in this Court by the United States, sought to plead their sovereign immunity as a bar to the action. This Court rightfully rejected those pleas even though it could not point to any express waiver of such immunity. This Court reasoned that unless a State were held liable to such suits then it could commit all sorts of constitutional violations with impunity. In this Court's words:

> "The establishment of a permanent tribunal with adequate authority to determine controversies between the states, in place of an inadequate scheme of arbitration, was essential to the peace of the Union. With respect to such controversies, the States by the adoption of the Constitution, acting 'in their highest sovereign capacity, in the convention of the people,' waived their exemption from judicial power. The jurisdiction of this Court over the parties in such cases was thus established 'by their own consent and delegated authority' as a necessary feature of the formation of a more perfect Union.
>
> "Upon a similar basis rests the jurisdiction of this Court of a suit by the United States against a State, albeit without the consent of the latter. While that jurisdiction is not conferred by the Constitution in express words, it is inherent in the constitutional plan. Without such a provision, as this Court said in United States v. Texas,

> supra, 'the permanence of the Union might be endangered.'"
> Monaco v. Mississippi, 292 U.S. 313, 328-9 (1934). Accord, Minnesota v. Hitchcock, 185 U.S. 371, 386-7 (1902).

Counterclaimant soundly endorses this rule of law and, even more importantly, the compelling reasons which support it. Since no state is above the constitution, no state ought to be able to plead its immunity when brought to the bar for violating it.

However, the question redounds, is justice (in the constitutional sense) to be a "one-way street"? Do not these same compelling reasons dictate that the United States equally ought not to be able to plead its sovereign immunity in a suit by a State? If all States are under the constitution is not also the United States government under it?

Your counterclaimant would here concede that this Court in a decades-old holding appears to have rejected this argument. The Court there stated that,

> "It does not follow that because a state may be sued by the United States without its consent, therefore the United States may be sued by a state without its consent. Public policy forbids that conclusion."
> Kansas v. United States, 204 U.S. 331, 342 (1907).

However, one may read the entire Kansas decision (and subsequent similar decisions of this Court) and find not a

single "public policy" principle listed in support of the conclusion -- assuming, of course, that "public policy" may place a government above the constitution. Your counterclaimant submits that the paucity of reason or policy advanced to support the conclusion reached in Kansas is due to the impotency of it and that the Kansas decision ought to be re-examined and summarily rejected. The United States ought to be subject to suit in this Court by a State on an alleged constitutional violation.

What reasons exist for allowing suits against a State but not suits by a State against the United States (non obstante the plain wording of the constitution, which extends the judicial power of this Court to "all cases" Minnesota v. Hitchcock, 185 U.S. 371, 385 (1902) (court's emphasis) in which a State shall be a party)?

Can it be said that only the States and not the United States must function under the constitution? Surely, this is not so. Can it be said, as was done in feudal English courts, that the United States government is not subject to suit in this Court because this court owes its existence to it (as opposed to the constitution)? Surely, this is not so. Can it be said as a factual assumption that only States and not the United States government will exceed the bounds of the constitution? Surely, this is not so. See Ex Parte Endo, 323 U.S. 310 (1944); Korematsu v. United States, 323 U.S. 214 (1944) (Murphy, Jr., dissenting); Bolling v. Sharpe, 347 U.S. 497 (1954). Can it be said that such suits (alleged

constitutional violations brought by States) will be so numerous as to bankrupt the United States (assuming cost to be a valid criterion in constitutional rights area)? Surely, this is not so (in light of the "blanket" waiver of immunity on these actions in the Torts Claims Act).

Counterclaimant thus submits that it is "inherent in the constitutional plan" to bring the United States "before the bar" when the constitution is involved in a suit by a state. The quoted principles of Monaco v. Mississippi, supra, apply with equal force to this case and Kansas v. United States, supra, ought to be overruled.

Terminally, your counterclaimant submits that yet another reason why sovereign immunity should not bar this action is that it involves a counterclaim concerning the same subject matter as the original claim. It is the Plaintiff which has here invoked this Court's jurisdiction and which now seeks to escape it.

Again your counterclaimant must concede the existence of older decisions of this Court which appear to reject the proposition herein advanced. See, e.g., Illinois Central R.R. Co. v. Public Utilities Commission, 245 U.S. 495 (1918). Again, however, your counterclaimant must re-emphasize that these decisions totally fail to explain the reason for the conclusion reached.

These decisions appear to create an anomaly in that they are contrary to the

general principle that when the United States comes to Court as a suitor, it stands in the position of a private litigant Luckenbach S.S. Co. v. The Thekla, 266 U.S. 328 (1924). In the Thekla case the United States joined with admiralty action and then sought to avoid liability on a cross-libel by pleading sovereign immunity. This Court began its opinion by stating the general rule with reference to the status of the United States as a suitor, to wit:

> "When the United States comes into Court to assert a claim it so far takes the position that justice may be done with regard to the subject matter. The absence of legal liability in a case where but for its sovereignty it would be liable does not destroy the justice of the claim against it." 266 U.S. at 339-40.

This Court then proceeded to hold that the United States could be sued via the cross-libel and rejected the argument that statutory authorization for same was lacking, by stating:

> "It is said that there is no statute by which the Government accepted this liability. It joined the suit, and that carried with it the acceptance of whatever liability the courts may decide to be reasonably incident to that act." 266 U.S. at 341.

It must be conceded that in so holding, the Thekla Court placed particular emphasis upon the nature of the cause of action involved, i.e., an "in rem" action. Assuming, without conceding, that the instant action is "in personam" (since the ultimate question in this action is the determination of title to specific land areas), your counterclaimant submits that this factor logically should not materially alter the result.

First, your counterclaimant is unaware of any principle of law which states that the United States, as a suitor, binds itself to do justice only in admiralty (or in rem) cases. To state the possibility of such a rule of law is to uncover the absurdity of it.

Second, your counterclaimant was of the current legal opinion that, at least where constitutional claims are involved, "labels" do not count. In Re Gault, 387 U.S. 1(1967). In this regard it should be clear that the counterclaim deals with the same subject matter as the original claim (albeit seeking different relief) whether the instant action be labelled "in personam," "quasi in rem," or "in rem."

Third, it is clear that utterly none of the reasons originally advanced in support of sovereign immunity apply to actions on counterclaims. Here the sovereign (even in the divine kingly sense) is not being forced to enter his own courts, but rather, he has voluntarily subjected himself to their jurisdiction. So also, in these instances the "monetary" rationale (in those opinions bold enough to state this as a reason for immunity) disappears,

since a holding of liability here would not create the spectre of hundreds or thousands of "uninvited" lawsuits.

With respect to Plaintiff's immunity defense your counterclaimant simply asks this Court to remain true to the admonition of Mr. Justice Holmes and to recognize the Plaintiff's defense for what it is -- the vestigial remains of feudal English monarchial philosophy. Reason and the underlying principles of our system of government and justice dictate against application of the doctrine to the facts presented by this case. Only the echoes of the archaic past call for its application. The counterclaim of the State of Florida should be considered on its merits.

B. Sovereign Immunity Has Been Waived

Alternatively, the counterclaimant contends there has been an effective Waiver of Sovereign Immunity in this case.

Title 28 U.S.C. §1491, provides, inter alia, that the Court of Claims shall have jurisdiction to render judgements upon any claim against the United States founded upon the constitution; or founded upon any act of Congress. The counterclaim Sub Judice is clearly founded upon the aforestated bases of Jurisdiction of the Court of Claims.

It has long been held that the Court of Claims has jurisdiction of actions by the states against the United States for

demands arising out of an act of Congress and the constitution. U.S. v. Louisiana, 123 U.S. 32, 8 S.Ct. 17, 31 L.Ed. 69 (1887). Thus, Congress having waived sovereign immunity as to a state suing the United States in this forum, the only issue to be resolved is whether or not such an action could be maintained in the Supreme Court as well.

Title 28, U.S.C., §1251(b)(2) provides that the Supreme Court shall have original but not exclusive jurisdiction of all controversies between the United States and the states. It was held in U.S. v. Louisiana, supra, that the Supreme Court does not have exclusive jurisdiction of actions where a state is Plaintiff against the United States and that the Court of Claims has concurrent jurisdiction with the Supreme Court in these cases.

The Court of Claims having concurrent jurisdiction with the Supreme Court in original proceeding where a state is suing the United States, and the Court of Claims being per se a waiver of sovereign immunity, a fortiori, such waiver of sovereign immunity must logically extend to original actions in the Supreme Court.

The foregoing contention is fortified by the fact that by virtue of Title 28 U.S.C. §1255, the Supreme Court may review by Writ of Certiorari cases in the Court of Claims. The reviewing of cases wherein sovereign immunity has been waived is a waiver in itself. The Court of Claims, being a "legislative" court (U.S. v. Sherwood 312 U.S. 584, 61 S.Ct. 767, 85 L.Ed. 1058 [1941]), the "Judicial Power" of Art. III, U.S. Constitution, is not involved and Congress's provision for

review is a legislative grant and a discretionary waiver of sovereign immunity on review.

If this Court denies jurisdiction of the counterclaim, the anomalous effect would be to defer this action to the Court of Claims over which this Court has ultimate power of review; such a circuity of litigation is unwarranted because the facts of this case are presently before the Court.

Logically, if the Supreme Court can review cases involving the waiver of sovereign immunity or if the power to grant review on Petition for Writ of Centiorari is a waiver of sovereign immunity within itself, certainly the Supreme Court can entertain such actions as an original matter.

While perhaps the status of sovereign immunity should be clarified by legislation, counsel for the State implores the Court, pending such legislation, by interpretation to give the widest possible effect to statutes waiving sovereign immunity. Congress by statutes such as the Tucker Act, the Federal Torts Claim Act, and the Court of Claims has abolished sovereign immunity. We suggest the evident spirit of these laws should be carried out. Procedural anachronisms should not be employed to limit the liberal policy of such statutes. The Court may use as their guide the phrase inextricably linked with the history of English attempts to evade the tenacles of the immunity concept -- "Let right be done!"

II. CLAIM UPON WHICH FLORIDA IS ENTITLED TO RELIEF

Basically, the State of Florida contends, inter alia, that Congress, by act of June 25, 1868, 15 Statutes 73, approved Florida's marine boundary in excess of three (3) geographic miles in the Atlantic; thus, conveying all right and interest in title, the United States may have had in the submerged lands and superadjacent waters within such boundary.

The United States seemingly contends that the Submerged Lands Act limits the above stated grant to three (3) geographic miles in the Atlantic.

If the contentions of both parties are correct, the subsequent act of Congress works as a "taking" of property without just compensation in violation of the Fifth Amendment to the United States Constitution.

Counterclaimant concedes that if the Court agrees with its contention that the Act of 1868 was a grant or conveyance from the United States, and that the Submerged Lands Act has no limiting effect, that the counterclaim would be moot.

However, if the Court finds as a matter of law that the Submerged Lands Act limits Florida's claim or that any holding of this Court, past or present, limits Florida's claim under the Act of 1868, then the counterclaim is viable and states a cause of action.

Therefore, the counterclaimant prays this Court will withhold determination whether vel non the counterclaim states a cause of action at this juncture of litigation.

While the counterclaim may seem precipitous, its presence in regard to final judgement is essential to the inclusiveness and conclusiveness of this matter. If the Court rejects the counterclaim at this time, it is possible that this Court will again be confronted with this matter on Petition for Writ of Certiorari from the Court of Claims; such procedure would be unnecessarily burdensome and expensive to the Court and to the parties.

III. THE DEMAND FOR A JURY TRIAL SHOULD BE GRANTED

Title 28 U.S.C. §1872 provides "In all original actions at law in the Supreme Court against citizens of the U.S., issues of fact shall be tried by a jury."

Florida contends this statute entitles it to a trial by jury. The United States contends that it does not, because a state is not a "citizen."

The absurdity of the movant's contention is best illustrated in its Memorandum in Support of Motion. The movant claims on Page 6 of said Memorandum in regard to sovereign immunity that "[t]here is no reason why this rule, [Government's immunity extends to counterclaims] like the prohibition on initiating suits, should not apply equally to suits by states as to suits by individuals. On Page 9 of said Memorandum the movant states "[t]he State of Florida cannot be construed to be a 'Citizen' under the terms of Section 1872."

Counsel assumes the government's reference to an "individual" in reference to a "citizen."

Rather than take issue with the contradictions of movant's Memorandum, the counterclaimant contends that if §1872 does not provide for jury trials for the states, said section is unconstitutional in regard to the U.S. Constitution, Amendment VII, which states:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved..."

Alternatively, if §1872 does not provide for jury trials for the States, Florida relies on Amendment VII as a self-implementary provision of the Constitution to provide the right to a jury trial and demands the same.

Terminally, the government contends this "case" is not an "action at law." True, the complaint is in the nature of a quiet title action, but the counterclaim is an action at law insomuch as damages are demanded for an unlawful taking of property as alleged.

Juries are traditional in condemnation cases. The case at bar is similar in nature.

CONCLUSION

For reasons stated, the motion of the U. S. should be denied in all respects.

Respectfully submitted,

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HERBERT T. SCHWARTZ
Deputy Attorney General

W. ROBERT OLIVE, JR.
Assistant Attorney General

RONALD W. SABO
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32304

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of August, 1971, a copy of this Memorandum in Opposition to Motion by the United States to dismiss the counterclaim and deny the demand for jury trial filed by the State of Florida was mailed, postage prepaid, to Honorable John N. Mitchell, Attorney General of the United States, and Honorable Erwin N. Griswold, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530.

_____
W. ROBERT OLIVE, JR.
Assistant Attorney General

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973 No. 52 Original

UNITED STATES OF AMERICA,

Plaintiff

v.

STATE OF FLORIDA,

Defendant

Report of Albert B. Maris, Special Master

January 18, 1974

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973 No. 52 Original

UNITED STATES OF AMERICA,
Plaintiff

v.

STATE OF FLORIDA,
Defendant

REPORT OF ALBERT B. MARIS, SPECIAL MASTER

A. HISTORY OF THE PROCEEDING

This proceeding involves the determination of the extent of the rights of the State of Florida, as against the United States, to the seabed and subsoil of the continental shelf seaward of its coastline on the Atlantic Ocean and the more precise determination than has heretofore been made of the extent of those rights seaward of its coastline in the Gulf of Mexico.

In this proceeding a claim of the United States for relief against the State of Florida which was originally asserted in the complaint filed on June 16, 1969 with leave of Court, 395 U.S. 955, in the case of the *United States v. the States of Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia and Florida*, No. 35 Original, and severed therefrom on June

28, 1971, 403 U.S. 949, has been consolidated with a supplemental proceeding which the Court on the same date, 403 U.S. 950, authorized to be initiated by the United States and the State of Florida in the case of the *United States v. the States of Louisiana, Texas, Mississippi, Alabama and Florida*, No. 10 Original. That case was subsequently designated as No. 9 Original and this designation will be used in this report. Briefly stated, the relief sought against the State of Florida in Case No. 35 Original, and which is now sought in this consolidated proceeding, is a decree defining the seaward boundary of the submerged lands of the continental shelf in the Atlantic Ocean in which the State of Florida has rights to the natural resources and beyond which the United States has those rights. The relief sought with respect to the State of Florida in the supplemental proceeding initiated in Case No. 9 Original and which is also now sought in this consolidated proceeding is a decree defining with greater particularity than is stated in the decree entered on December 12, 1960 in No. 9 [then No. 10] Original, 364 U.S. 502, the seaward boundary of the submerged lands of the continental shelf in the Gulf of Mexico in which the State of Florida has rights to the natural resources and beyond which the United States has those rights. By the decree of December 12, 1960 the Court determined that the State of Florida, as against the United States, is entitled to all the lands, minerals and other natural resources underlying the Gulf of Mexico extending seaward from its coastline for a distance of three leagues and reserved jurisdiction to entertain such supplemental proceedings as might from time to time be deemed necessary or advisable to give proper force and effect to the decree.

The complaint in No. 35 Original alleges with respect to the claim against the State of Florida that the United States is entitled, to the exclusion of the State, to exercise sovereign rights over the seabed and subsoil underlying the Atlantic Ocean seaward from the three-mile limit (within

which limit the United States has transferred its rights to the State by the Submerged Lands Act of 1953, 67 Stat. 29) out to the limits of the continental shelf for the purpose of exploring the area and exploiting its resources. The complaint further alleges that the State of Florida claims rights in the seabed and subsoil in question. Similar allegations are made in the complaint with respect to the twelve other Atlantic seaboard states and a declaratory decree is sought.

All the defendant states filed answers to the complaint. The State of Florida subsequently filed an amended answer. In its amended answer the State admits that it claims an interest in the seabed, subsoil and natural resources of the continental shelf in the Atlantic Ocean more than three miles seaward from its coast, but denies the other allegations of the complaint. An affirmative defense is set up by the State that by the Act of June 25, 1868, 15 Stat. 73, Congress approved the marine boundaries of the State described in Article I of its Constitution of 1868, which boundaries, it asserts, run more than three miles seaward from its coast in certain parts of the Atlantic Ocean, and that Congress thereby granted to the State whatever interest the United States possessed in the maritime territory within those boundaries. The amended answer further asserts that the body of water known as the Straits of Florida is an arm of the Gulf of Mexico or, in the alternative, that the Florida Keys and the Marquesas and Dry Tortugas Islands are located in the Gulf of Mexico and that the State is, therefore, entitled to a southern seaward boundary of three leagues from its coastline wherever located in this area. The affirmative defenses set up in the answers of the twelve other Atlantic seaboard states are entirely different from that asserted by the State of Florida, being based, in the case of each of those states, upon its claim to have received from England while it was a British colony (and, in the case of the State of New York, also from Holland while it was a Dutch colony) certain rights in the portion of the seabed in question which it did

not lose upon declaring its independence or upon becoming a part of the Federal Union.

As has been stated, on June 28, 1971 the Court severed the claim of the United States against the State of Florida from its claim against the twelve other defendant states in No. 35 Original, and on the same day authorized the initiation of supplemental proceedings in No. 9 Original to define with greater particularity than is stated in the decree of December 12, 1960, the seaward boundary of the submerged lands in the Gulf of Mexico in which the State of Florida has rights in the natural resources and beyond which the United States has those rights. On the same day, the Court consolidated the claim of the United States against the State of Florida which it had severed from Case No. 35 Original with the supplemental proceeding with respect to the State of Florida in No. 9 Original, the consolidated proceeding to be docketed as Case No. 52 Original, and appointed the undersigned as special master to conduct the proceeding, take testimony therein, and report thereon to the Court. 403 U.S. 949, 950.

A prehearing conference was held by me in Philadelphia on September 14, 1971 at which counsel submitted a joint prehearing statement which stipulated certain facts at issue in the proceeding. On September 22, 1971, I made a prehearing order adopting the joint prehearing statement of the parties, outlining the procedure to govern the further conduct of this proceeding and specifying the materials in the files in Nos. 9 and 35 Original which are to be part of the record in this proceeding. On November 8, 1973, I made an order amending paragraph 12 of the prehearing order. A copy of the prehearing order as amended, to which is attached the joint prehearing statement of the parties, is included in the appendix to this report.

The amended answer of the State of Florida in No. 35 Original had set up a counterclaim for damages and included a demand for a jury trial of the counterclaim.

The United States filed a motion to dismiss the counterclaim and deny the demand for a jury trial, which motion and the response of the State of Florida thereto were referred to me as special master for report and recommendation. I held a hearing thereon in Philadelphia on October 22, 1971. At the hearing the State asserted that its counterclaim was based solely upon the proposition that the provisions of the Submerged Lands Act operated as a taking by the United States without compensation of its rights to portions of the seabed beyond the three-mile limit in the Atlantic Ocean which were claimed by the United States. In reply the United States asserted that the Submerged Lands Act operated solely as a grant to the State; that if, contrary to the contention of the United States, the State of Florida did have preexisting seabed rights in the Atlantic Ocean beyond the three-mile limit the Submerged Lands Act did not diminish them and that it would continue to adhere to this view in this case. Accordingly, I filed a report recommending dismissal of the counterclaim and denial of the demand for a jury trial and my recommendation was adopted by the Court on December 20, 1971. 404 U.S. 998.

Formal hearings for the receipt of evidence were held in Tallahassee on March 6, 1972 and in Miami on September 26 and 27, 1972 and December 12 and 13, 1972. Thereafter briefs were submitted and oral argument by counsel took place in Philadelphia on September 19, 1973. From the evidence, both oral and documentary, and the stipulation of facts contained in the joint prehearing statement of the parties and after consideration of relevant matters of which judicial notice may be taken, I have made the findings of fact which appear as statements of fact throughout this report.

B. THE QUESTIONS INVOLVED

As already indicated, the ultimate question for decision in this proceeding is the determination of the seaward limits of the area of the seabed of the continental shelf in the Atlantic Ocean and the Gulf of Mexico in which the State of Florida has the proprietary right to the natural resources and seaward of which the United States has that right. In respect to those rights in the Gulf of Mexico, the Court has heretofore held in No. 9 Original "that the Submerged Lands Act grants Florida a three-marine-league belt of land under the Gulf, seaward from its coastline, as described in Florida's 1868 Constitution." 363 U.S. 121, 129. Accordingly, the supplemental proceeding in No. 9 Original relating to the Gulf of Mexico which is now part of the present consolidated proceeding is particularly directed to the more specific determination of the location of that coastline. However, it also involves the question whether the State of Florida is entitled to the full three-league belt of seabed seaward of that portion of its Gulf coastline, including the seaward limit of inland waters, south of Cape Romano in the region of the Florida Keys and Florida Bay. In determining these ultimate questions as to the extent of the rights of the State of Florida in the adjacent seabed of the Atlantic Ocean and the Gulf of Mexico, a number of subsidiary questions arise which must be dealt with and to these I now turn.

1. The effect of Congressional approval of Florida's 1868 Constitution as approval of the State boundaries described therein.

Pursuant to the authority of the Acts of Congress of March 2, 1867, 14 Stat. 428, and March 23, 1867, 15 Stat. 2, which provided the procedure by which secessionist states might be admitted to representation in Congress, the State of Florida adopted a new constitution

in 1868. By the Act of June 25, 1868, 15 Stat. 73, Congress approved the Florida Constitution of 1868 and admitted Florida to representation in Congress.

The Florida Constitution of 1868 in Article I described the boundaries of the State as follows:

> "The boundaries of the State of Florida shall be as follows: Commencing at the mouth of the river Perdido; from thence up the middle of said river to where it intersects the south boundary line of the State of Alabama, and the thirty-first degree of north latitude; then due east to the Chattahoochee river; then down the middle of said river to its confluence with the Flint river; from thence straight to the head of the St. Mary's river; then down the middle of said river to the Atlantic ocean; thence southeastwardly along the coast to the edge of the Gulf Stream; thence southwestwardly along the edge of the Gulf Stream and Florida Reefs to and including the Tortugas Islands; thence northeastwardly to a point three leagues from the mainland; thence northwestwardly three leagues from the land, to a point west of the mouth of the Perdido river; thence to the place of beginning."

In the opinion of the Court handed down on May 31, 1960 in No. 9 Original, it was held that by the Act of June 25, 1868 Congress approved the boundaries in the Gulf of Mexico thus claimed by the State in Article I of its 1868 Constitution, that being the only part of the State boundaries which was involved in that case, and that those boundaries were accordingly "boundaries . . . heretofore approved by the Congress" within the meaning of the Submerged Lands Act of 1953. 363 U. S. 121, 128. That Act will be discussed later in this report. Since Congress approved the 1868 Constitution as a whole, which document described the State boundaries in the Atlantic Ocean as well as in the Gulf of Mexico, it would appear

that the questions involved in the approval of each of these segments of the State boundary are necessarily identical in principle. The conclusion of the Court that the approval by Congress of the Constitution of 1868 involved approval of the boundary claimed by that Constitution in the Gulf of Mexico is thus equally applicable to the Atlantic boundary claimed in the same Constitution. It necessarily follows that Congress by the Act of June 25, 1868 approved the Atlantic boundary as well as that in the Gulf of Mexico.

2. The effect of Congressional approval of Florida's 1868 Constitution as a grant, express or implied, to the State of the proprietary right to the seabed and its natural resources within the boundaries described in the Constitution.

I consider first whether Congress expressly granted to the State of Florida the rights which it now claims to the submerged lands within its 1868 boundaries. The Act of June 25, 1868, 15 Stat. 73, upon which the State relies, contains no such express grant. By clear implication it approved the State Constitution of 1868, which approval Congress was required by the Acts of March 2, 1867, 14 Stat. 428, and March 23, 1867, 15 Stat. 2, to give before the State was readmitted to representation in Congress. And, as we have seen, the Court has held that this approval included the approval of the boundaries of the State which were set forth in that Constitution. But I find no language in either the Acts of 1867 or the Act of 1868 even remotely suggesting that Congress by the Act of 1868 intended to make a grant to the State of the seabed within those boundaries or that it did in fact do so.

I conclude that the claim of the State of Florida to an express grant from the United States must, therefore, be rejected.

The question remains whether a grant by the United

States of rights in the bed of the sea which lies within the boundaries of the State may be implied from the 1868 Congressional approval of those boundaries. Certainly the recognition of a maritime state boundary by the United States must have some effect with respect to the power of the state in the maritime belt of sea within that boundary. See *United States v. California*, 1947, 332 U.S. 19, 36. Otherwise the boundary would be quite meaningless, a mere line upon the map. And so it is clear to me that the State of Florida does have certain governmental power within that maritime area, particularly in matters of special concern to the State and in which the United States has not preempted the field. See, e.g., *Skiriotes v. Florida*, 1941, 313 U.S. 69, and *Askew v. American Waterways Operators, Inc.*, 1973, 411 U.S. 325. But this power is subordinate to the paramount power and rights of the United States, its *imperium* and *dominium*, in and over the marginal belt of territorial sea along the coasts of the State, the protection and control of which area has always been a function of national external sovereignty.

In the opinion of the Court in *United States v. California*, 1947, 332 U.S. 19, 38-39, it was expressly held that the United States, rather than the State of California, has paramount rights in and power over the marginal belt of territorial sea, an incident of which is full dominion over the resources of the seabed within that water area. It appeared in that case that the State of California had been admitted to the Union by an Act of Congress of September 9, 1850, 9 Stat. 452, with a constitutionally fixed boundary extending three miles from low-water mark into the Pacific Ocean, which boundary the Act of 1850 ratified. Nonetheless, refusing to extend the inland waters rule of *Pollard's Lessee v. Hagan*, 1845, 3 How. (U.S.) 212, the Court held, as I have indicated, that the State of California was not the owner of the three-mile marginal belt along its coast. This principle was reaffirmed by the Court in *United States v. Louisiana*, 1950, 339 U.S. 699, and *United States*

v. Texas, 1950, 339 U.S. 707, and applied in denying the seabed claims of those states. Indeed, in the Texas case the Court went on to hold [pp. 717-718] that the State of Texas had relinquished to the United States its claim to the marginal sea when it was admitted to the Union even though as an independent republic before admission it had a maritime boundary in the Gulf of Mexico within which it had all the jurisdiction, powers and proprietary rights of a sovereign state. Later, the Court expressly pointed out that the doctrine of *United States v. California*, 1947, 332 U.S. 19, is applicable to all coastal states. *United States v. Louisiana*, 1960, 363 U.S. 1, 7.

The State of Florida contends that the United States accepted the cession of Florida from Spain as a trustee for the states later to be created from that territory, that the cession included rights of ownership in the maritime belt of territorial sea along its coasts and that when the State of Florida was admitted to the Union it received those rights as trustee for its people. *Pollard's Lessee v. Hagan*, 1845, 3 How. (U.S.) 212 and *Shively v. Bowlby*, 1894, 152 U.S. 1, are relied upon to support this position. It is a sufficient answer to this contention, however, to recall that the doctrine of these cases was restricted by the Court in *United States v. California*, 1947, 332 U.S. 19, 36, to the inland waters of a state shoreward of the low-water mark along its coast and that the doctrine is not applicable, as the State of Florida contends, to the seabed of the ocean seaward from the low-water mark.

The State of Florida further suggests that the doctrine enunciated in *United States v. California*, 1947, 332 U.S. 19, and followed in *United States v. Louisiana*, 1950, 339 U.S. 699, and *United States v. Texas*, 1950, 339 U.S. 707, has been overruled in effect by the enactment of the Submerged Lands Act of 1953. That Act will be discussed later in this report. It is sufficient here merely to point out that in *United States v. Louisiana*, 1960, 363 U.S. 1, 6-7, the Court said of the Submerged Lands Act:

". . . By that Act the United States relinquished to the coastal States all of its rights in such lands within certain geographical limits, and confirmed its own rights therein beyond those limits. The Act was sustained in *Alabama v. Texas*, 347 U.S. 272, as a constitutional exercise of Congress' power to dispose of federal property. Const. Art. IV, §3, cl. 2. Since the Act concededly did not impair the validity of the *California, Louisiana,* and *Texas* cases, which are admittedly applicable to all coastal States, this case draws in question only the geographic extent to which the statute ceded to the States the federal rights established by those decisions."

I conclude that the State of Florida did not receive from Congress in 1868 an implied grant of the proprietary rights to the bed of the marginal sea within the boundaries fixed by its 1868 Constitution.

3. The effect of the Submerged Lands Act of 1953.

In the cases of *United States v. California*, 1947, 332 U.S. 19, *United States v. Louisiana*, 1950, 339 U.S. 699, and *United States v. Texas*, 1950, 339 U.S. 707, the Court had held, as we have seen, that the claims of those states to the ownership of the seabed of the marginal sea beyond the low-water mark of the coastline and the seaward limit of inland waters were invalid because the United States had rights paramount to the states in that area. In order to grant to the states, at least in part, the rights in the seabed of the marginal sea for which they had contended, Congress shortly thereafter enacted the Submerged Lands Act of May 22, 1953, 67 Stat. 29, 43 U.S.C.A. §§1301-1315, the text of which is set out in the appendix. The scope and effect of that Act have been fully considered and determined by the Court and it is quite unnecessary for me to analyze the Act in detail here. In *United States v. Cali-*

fornia, 1965, 381 U.S. 139, the Court described the effect of the Act as follows [pp. 145-148]:

> "The Submerged Lands Act grants to the States 'title to and ownership of the lands beneath navigable waters within the boundaries of the respective States.' §3(a). 'Boundaries' includes the seaward boundaries of a State 'as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress,' but subject to the limitation that
>
> > 'in no event shall the term "boundaries" . . . be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico.' §2(b).
>
> " 'Coast line' is then defined as the composite 'line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters.' §2(c). For States having no previously approved seaward boundaries the Act provides that '[a]ny State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line. . . .' §4."

In its earlier opinion in No. 9 Original with respect to the claims of the State of Florida, the Court summarized the effect of the Act as follows [363 U.S. 121-122]:

> "The Act granted to all coastal States the lands and resources under navigable waters extending three geographical miles seaward from their coastlines. In addition to the three miles, the five Gulf States were granted the submerged lands as far out as each State's boundary line either 'as it existed at the time such

> State became a member of the Union,' or as previously 'approved by Congress,' even though that boundary extended further than three geographical miles seaward. But in no event was any State to have 'more than three marine leagues into the Gulf of Mexico.' "

It thus appears that the Act grants title to and ownership of the lands and their natural resources beneath the navigable waters within the seaward boundaries of each maritime state, but specifies that for the purposes of the Act "boundaries" are only those existing at the time of admission to the Union or as theretofore approved by Congress and are to be interpreted as in no event extending more than three miles from the coastline into the Atlantic or Pacific Oceans or more than three leagues into the Gulf of Mexico. Moreover in order that a state admitted subsequently to the formation of the Union may have the full benefit of the Act, section 4 provides that any such state which has not already done so may extend its seaward boundaries to a line three miles distant from its coastline, without prejudice to the existence of any state's seaward boundary beyond three miles "if it has been heretofore approved by Congress." The latter provision was added to assure that the three-league Gulf "boundary claims of Texas and Florida would be preserved." *United States v. Louisiana*, 1960, 363 U.S. 1, 29. In *United States v. Florida*, 1960, 363 U.S. 121, 128, the Court held, as we have seen, that the boundary of the State of Florida on the Gulf coast was approved by Congress in 1868 as extending more than three miles seaward from the coastline, namely, three leagues. Its 1868 boundary along the Atlantic coast, however, was in certain areas less than three miles from the coastline as I shall later point out. Accordingly, taking advantage of the authority conferred on the State by section 4 of the Submerged Lands Act to extend its boundary on the Atlantic coast to the outer line of the three-mile belt of marginal sea, the State of Florida enacted the Act of

May 31, 1955, Laws of Florida, 1955, chap. 29744, which provided in whole as follows:

"AN ACT fixing and establishing the boundary of the State of Florida along the Atlantic Ocean and the Florida Straits, as authorized by Public Law 31, also described as Chapter 65, of the first session of the Eighty-third Congress of the United States.

"*Be It Enacted by the Legislature of the State of Florida:*

"WHEREAS, it is provided by section 4, chapter 65, or Public Law 31, of the First Session of the Eighty-third Congress of the United States, approved May 22, 1953 (title 43, sections 1301-1315, United States Code) that 'any state admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line . . .,' which coast line is defined by said act of congress as meaning 'the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters.' and,

"WHEREAS, the Atlantic boundary of the State, as set out in present article 'I' of the state constitution, is indefinite and not clearly defined, and should be redefined and extended in accordance with the authority granted by said section 4, of chapter 65, or public law 31, of the first session of the eighty-third Congress of the United States. *NOW, THEREFORE,*

"*Be It Enacted by the Legislature of the State of Florida:*

"Section 1.

"Wherever the coast line of the State of Florida,

both along the East coast of the mainland and along the Florida Keys, is in direct contact with the waters of the Atlantic Ocean or the Florida Straits, which latter is an arm of the Atlantic Ocean, the seaward boundary of the State of Florida is hereby fixed, defined, and interpreted as, and is hereby extended to, a line three geographical miles distant from said coast line. The term 'coast line' means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters.

"Section 2. All laws and parts of laws in conflict herewith are hereby repealed.

"Section 3. This act shall take effect immediately upon its becoming a law.

"Approved by the Governor May 31, 1955."

The boundary provisions of Article I of the 1868 Constitution of the State of Florida had been carried without change into Article I of the revised Constitution of 1885. On November 6, 1962, the State adopted an amendment to Article I of the 1885 Constitution. This amendment defined the boundary of the State in the Atlantic Ocean in conformity with the Act of 1955. It also more precisely defined the boundary in the Gulf of Mexico. The text of the amendment is as follows:

"The state boundaries are: Begin at the mouth of the Perdido River, which for the purposes of this description is defined as the point where latitude 30° 16′ 53″ north and longitude 87° 31′ 06″ west intersect; thence to the point where latitude 30° 17′ 02″ north and longitude 87° 31′ 06″ west intersect; thence to the point where latitude 30° 18′ 00″ north and longitude 87° 27′ 08″ west intersect; thence to the point where the center line of the Intracoastal Canal (as the same existed on June 12, 1953) and longitude

87° 27′ 00″ west intersect; the same being in the middle of the Perdido River; thence up the middle of the Perdido River to the point where it intersects the south boundary of the State of Alabama, being also the point of intersection of the middle of the Perdido River with latitude 31° 00′ 00″ north; thence east, along the south boundary line of the State of Alabama, the same being latitude 31° 00′ 00″, north to the middle of the Chattahoochee River; thence down the middle of said river to its confluence with the Flint River; thence in a straight line to the head of the St. Mary's River; thence down the middle of said river to the Atlantic Ocean, and extending therein to a point three (3) geographic miles from the Florida coast line, meaning the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters; thence southeastwardly following a line three (3) geographic miles distant from the Atlantic coast line of the state and three (3) leagues distant from the Gulf of Mexico coast line of the state to and around the Tortugas Islands; thence northeastwardly, three (3) leagues distant from the coast line, to a point three (3) leagues distant from the coast line of the mainland; thence north and northwestwardly, three (3) leagues distant from the coast line, to a point west of the mouth of the Perdido River, three (3) leagues from the coast line, as measured on a line bearing 0° 01′ 00″ west from the point of beginning; thence along said line to the point of beginning."

It seems clear from both the language and effect of this Constitutional amendment that its purpose, at least in part, was to place in constitutional form the change made by the Act of 1955 in extending the boundary of the State seaward into the Atlantic Ocean at all points to the

full three geographical miles distant from its coastline which the Submerged Lands Act had authorized. And since section 4 of that Act expressly approves and confirms any such action taken either before or after 1953, it is also clear that the boundary defined by the Act of 1955 and the 1962 Constitutional amendment was a boundary "extended or confirmed" pursuant to that section within the meaning of section 2(b) of the Act. It necessarily follows that the State of Florida is entitled under the Submerged Lands Act, as against the United States, to title to and ownership of the lands beneath the navigable waters and the natural resources within such lands and waters seaward for a distance of three geographical miles, but no farther, along its entire Atlantic coastline as defined in that Act.

There are some places along the Atlantic coast of the State of Florida where the 1868 boundary lies at a greater distance than three miles from the coast. Here the effect of the 1955 Act and the 1962 Constitutional amendment was to abandon the jurisdiction of the State and to relinquish to the United States its incidental claim (which I have held to be invalid) to the seabed in the areas beyond the new three-mile Atlantic boundary which the Act and the Constitutional amendment fixed. For at that time the United States, pursuant to President Truman's proclamation of September 28, 1945, 59 Stat. 884, was claiming the right to the resources of the seabed of the continental shelf, an area in which the rights of the United States are in any event paramount to those of the State. *United States v. California*, 1947, 332 U.S. 19, 38-39. And the rights of the United States as against the coastal states to the seabed of the continental shelf, beyond the coastal belt which had been granted to the States by the Submerged Lands Act, had been confirmed by the enactment of the Outer Continental Shelf Lands Act of August 7, 1953, 67 Stat. 462. The authority of Congress to deal with the seabed of the continental shelf and its resources is fully recognized by the rules of international law which have now been codified

in the Convention on the Continental Shelf, 15 U.S.T. (Pt. 1) 471, which entered into force on June 10, 1964.

I accordingly find that the State of Florida is entitled, as against the United States, to the land beneath navigable waters and the natural resources within such lands and waters within its boundaries approved by Congress extending three geographical miles from its coastline on the Atlantic coast and not more than three marine leagues from its coastline on its Gulf of Mexico coast. It follows, of course, that beyond those limits the United States has the right, as against the State of Florida, to explore and exploit the seabed of the continental shelf and its resources.

4. The dividing line between the Atlantic Ocean and the Gulf of Mexico.

In view of the fact that the Submerged Lands Act grants Florida a belt of up to three leagues of submerged lands along its Gulf of Mexico coast but only a three-mile belt along its Atlantic coast, it becomes necessary to determine where on the Florida coast the Gulf of Mexico ends and the Atlantic Ocean begins. Since the Act contains no description of the extent or limits of the Gulf of Mexico the area comprising the Gulf must be determined in the light of general understanding and usage in 1953 when the Act was passed. The evidence of expert witnesses and a large amount of documentary evidence were received by me on this question.

Stated differently, the question is whether the Straits of Florida which lie between the islands of Cuba and the Bahamas on the south and east and the Florida Keys on the north and west are an arm of the Atlantic Ocean or of the Gulf of Mexico. The question seems to turn on whether we accept the views of geographers, cartographers, historians and explorers who are primarily concerned with the surface of the sea, as the United States urges, or those of marine geologists who are primarily concerned with the topography of the sea floor, as Florida urges.

The United States points to a line which has been formulated by the International Hydrographic Bureau for the convenience of national hydrographic offices when compiling their sailing directions, notices to mariners, etc., so as to insure that all such publications headed with the name of an ocean or sea will deal with the same area. Admittedly, this line has no political significance, but the United States urges that it does represent the general view held by geographers, cartographers and historians. The line referred to is stated in the publication of the International Hydrographic Bureau, entitled "Limits of Oceans and Seas", Special Publication No. 23, 3d ed., issued in 1949, [U.S. Exhibit No. 63] to run through the island of Cuba "to the meridian of 83° W. and to the Northward along this meridian to the latitude of the South point of the Dry Tortugas (24° 35′ N.), along this parallel Eastward to Rebecca Shoal (82° 35′ W.), thence through the shoals and Florida Keys to the mainland at eastern end of Florida Bay, all the narrow waters between the Dry Tortugas and the mainland being considered to be within the Gulf." The same description has been repeated in the later printings of the publication in 1950 [U.S. Exhibit No. 64] and 1953 [U.S. Exhibit No. 58], and substantially the same line, although terminating at Key West rather than the eastern end of Florida Bay, was used in the 1st edition of the publication in 1923 [U.S. Exhibit No. 60] and its 2d edition in 1928 [U.S. Exhibit No. 61]. The testimony of Dr. Louis DeVorsey, a professional geographer, supports this line, as does a large amount of documentary evidence.

The State of Florida contends, on the other hand, that it is the configuration of the sea bottom which determines the question and points out that if they were all parts of a dry upland basin the Straits of Florida would drain into the basin of the Gulf rather than into the Atlantic Ocean. The State argues that, by this criterion, the Straits of Florida southwest of latitude 25° 40′ north must be held to be a part of the Gulf of Mexico and not of the Atlantic

Ocean. The position of the State is supported by the testimony of Dr. Robert N. Ginsburg, a marine geologist and sedimentologist, and some documentary evidence.

I cannot accept this view. In my opinion the position taken by the United States is correct that it is the concept of the Gulf of Mexico as understood by geographers, mariners, explorers and historians with which Congress was concerned when it referred to the Gulf in the Submerged Lands Act. I find the great weight of the evidence to support the concept that the Straits of Florida are an arm of the Atlantic Ocean and not of the Gulf of Mexico. Moreover, I am fortified in this conclusion by the confirmatory evidence of the State of Florida when, in the Act of May 31, 1955, which was drafted in the light of the Submerged Lands Act and which I have already quoted, the State, in defining the extended Atlantic coast boundary which it was establishing, declared that the Florida Straits "is an arm of the Atlantic Ocean". While the Act of 1955 was repealed in 1971 (Chapter 71-348), it stands as an expression of the understanding of the State at about the time of the enactment of the Submerged Lands Act.

I am satisfied that the dividing line fixed by the International Hydrographic Bureau in its publication "Limits of Oceans and Seas" is the correct one. As we have seen, that line extends from the island of Cuba north on the meridian of 83° west longitude to the south point of the Dry Tortugas and from this point along the parallel of 24° 35′ north latitude eastward to Rebecca Shoal and "thence through the shoals and Florida Keys to the mainland at eastern end of Florida Bay". The line of the parallel of 24° 35′ north latitude extended eastward from Rebecca Shoal passes over the Quicksands Shoal and intersects the Marquesas Keys. Eastward of the Marquesas Keys the succession of islands in the Florida Keys bears southeastwardly to Woman Key and thence northeastwardly to Key Largo. I find, therefore, that the dividing line between the waters of the Atlantic Ocean and the Gulf of Mexico coincides

with the parallel of 24° 35′ north latitude from the south point of the Dry Tortugas to the Marquesas Keys.

I accordingly find that the line dividing the Gulf of Mexico from the Atlantic Ocean north of Cuba begins on the northern coast of Cuba at the meridian of 83° west longitude, and extends thence to the northward along that meridian to the south point of the Dry Tortugas in 24° 35′ north latitude; thence eastward along that parallel to Rebecca Shoal, the Quicksands Shoal and the Marquesas Keys; and thence through the Florida Keys to the mainland at the eastern end of Florida Bay, all the narrow waters between the Dry Tortugas, the Keys and the mainland being considered to be within the Gulf.

5. The location of the 1868 State boundaries.

I turn next to consider the precise location of the 1868 boundary of the State, as it existed prior to the enactment of the Florida Act of May 31, 1955 and the adoption of the Constitutional Amendment of 1962. The land portion of the boundary from the mouth of the Perdido river to the mouth of the St. Mary's river is, of course, not involved in this proceeding. The remainder of the boundary will be considered in consecutive segments.

(a) *"then down the middle of said river [the St. Mary's] to the Atlantic ocean; thence southeastwardly along the coast to the edge of the Gulf Stream;"*

The general trend of the Florida coastline on the Atlantic Ocean is, and in 1868 was, "southeastwardly" between the mouth of the St. Mary's river and a point one geographical mile north of Lake Worth inlet. The State argues that "along the coast" as here used means "parallel to the coast" and its expert witness testified that the boundary line should be drawn down the middle of the St. Mary's river to its mouth and out to the last ocean buoy between two and one-half and three miles from the river

mouth in 10 fathoms of water and thence southeastwardly following the 10-fathom contour line off the coast to the point where the coast takes a southwestwardly turn. I see no basis in the constitutional phrase "along the coast" for such a conclusion, however, and am compelled to accept the contention of the United States that this segment of the boundary, described as "along the coast", is coincident with the coastline and follows the low-water line along the coast and the line marking the seaward limit of inland waters.

It will be observed that this segment of the State boundary is to run southeastwardly along the coast "to the edge of the Gulf Stream". It must, therefore, be determined where the boundary reaches the Gulf Stream, the western edge of which I find lies along the 100-fathom contour line. This is the line which early cartographers seem to have agreed, and which the parties now agree, represents the edge of the Gulf Stream. Since the boundary runs "southeastwardly" to the Gulf Stream, it appears, and the parties agree, that it must leave the coastline and proceed to the Gulf Stream at the point where the coastline ceases to run in a southeasterly direction but turns to the southward and southwestward. I find that this point on the coast is almost exactly one geographical mile north of Lake Worth inlet. The parties suggest that at this point the boundary turns due east to the 100-fathom line at the edge of the Gulf Stream. I see no basis, however, for such a deviation from the "southeastwardly" call. It appears that the coastline for a distance of at least four miles north of the point of departure mentioned above follows a very nearly straight course in a general southeastwardly direction. I conclude that a proper application of the constitutional language requires that the general heading of this final section of the boundary along the low-water mark of the coastline should be followed by the boundary in the same southeastwardly direction until it reaches the 100-fathom line at the western edge of the Gulf Stream.

(b) *"thence southwestwardly along the edge of the Gulf Stream and Florida Reefs to and including the Tortugas Islands;"*

It seems clear, and the parties agree, that this segment of the 1868 boundary follows the 100-fathom line along the western edge of the Gulf Stream, which in this area is almost parallel to and approximately three miles from the Florida coast, until the northern end of the Florida Reefs is reached, and that it then follows the five-fathom contour line, which the parties agree and I find to be generally recognized as representing the edge of a reef, along the southwestern and southern edge of the Florida Reefs to their western end and thence in a straight line a distance of about 27 miles to the five-fathom line on the south side of the Dry Tortugas Islands. The question remains, however, as to the point where the boundary leaves the Gulf Stream and follows the Florida Reefs. It appears that Fowey Rocks should be held to be that point. It is south of that point that the Gulf Stream diverges more and more from the Florida coast. Moreover, from early times, Fowey Rocks have been regarded as the true beginning of the reef, the first dry spot on it. South of Fowey Rocks the reef becomes the dominant geographic feature of the coastline; north of Fowey Rocks, commencing with Key Biscayne, sandy islands are the dominant feature. Accordingly, the parties agree, and I find, that this segment of the boundary follows the 100-fathom line along the western edge of the Gulf Stream southwardly to a point due east of Fowey Rocks and thence runs due west to the five-fathom line seaward of Fowey Rocks, thence southwestwardly along the five-fathom line seaward of the Florida Reefs to the western end of the Reefs and thence in a straight line to the five-fathom line south of the Dry Tortugas Islands.

I accordingly find that the section of the 1868 boundary of the State of Florida between the mouth of the

St. Mary's river and the Dry Tortugas Islands may be more precisely defined and located as follows:

> Beginning at the point where the middle of the St. Mary's river meets the seaward limit of the river mouth; thence in a general southeasterly direction along the ordinary low-water line along the coast and the line marking the seaward limit of inland waters to a point one geographical mile north of Lake Worth inlet; thence on the same heading as the coastline immediately to the north of that point in a general southeastwardly direction to the 100-fathom line on the western edge of the Gulf Stream; thence in a general southwardly direction along the 100-fathom line to a point due east of Fowey Rocks; thence due west to the five-fathom line seaward of Fowey Rocks; thence along the five-fathom line seaward of the Florida Reefs in a general southwestwardly direction to the western end of the Reefs; and thence northwestwardly in a straight line to the five-fathom line south of the Dry Tortugas Islands, and along the five-fathom line to the point where it intersects latitude 24° 35′ north.

(c) *"thence northeastwardly to a point three leagues from the mainland;"*

With respect to the segment of the boundary which runs from the Dry Tortugas Islands to the mainland the contentions of the parties are far apart. The State contends that the term "northeastwardly" as used to describe this segment of the boundary must be taken to mean due northeast, i.e., on a course 045° from north, and that by taking that course the boundary runs from a point three leagues northwest from the Dry Tortugas Islands in a straight line to a point three leagues from the mainland in the vicinity of Cape Romano. The United States, on the other hand, insists that the term "northeastwardly" indicates merely the general overall direction of the boundary in this area and that the boundary actually begins at the

northeasterly extremity of the shallow water surrounding the Dry Tortugas Islands, and from thence follows a straight line to the five-fathom line curving north of the "New Ground" shallows which lie northwest of the Marquesas Keys; from thence follows the five-fathom curve around the northern edge of these shallows to their eastern extremity; from thence follows a straight line to the three-fathom line north of the Marquesas Keys; and from thence follows the three-fathom line north of the Marquesas Keys and north and east of the Florida Keys and the shallow waters of Florida Bay to a point where the three-fathom line intersects an arc of a circle with a diameter of three leagues centered on the Northwest Cape of Cape Sable.

I am unable to accept either of these contentions. The term "northeastwardly" does not indicate a specific direction as may the more precise term "northeast". On the contrary, "northeastwardly" merely indicates a general direction which may be anywhere between north and east, depending upon other factors such as any relevant meets and bounding features which may be specified or implied. Here only one meet is specified, the Dry Tortugas Islands. The other end of this segment of the boundary, a "point three leagues from the mainland", is indefinite since it may be located at any place on the outer line of the three-league belt of marginal sea lying along the coast of the mainland. We must, therefore, look elsewhere for light on the intended location of this portion of the boundary.

The State of Florida points to the physical fact that the western portion of the boundary contended for by the United States actually runs southeastwardly rather than northeastwardly and does not take a northeasterly course until it reaches the vicinity of Boca Grande Key. This is quite true, but I do not believe that the term "northeastwardly", as here used, is to be given so restricted a meaning. On the contrary, as I have already suggested, I think it is intended to indicate merely the general direction of this section of the boundary taken as a whole.

In this broad sense the line contended for by the United States does run northeastwardly. Both Cape Sable and Cape Romano, the termini contended for by the United States and the State, respectively, are in fact situated north and east of the point of beginning, the Dry Tortugas. A consideration of other language in the 1868 Constitutional boundary description fortifies this view. Thus the line along the Florida Reefs and to the Dry Tortugas is defined by the 1868 Constitution as running "southwestwardly" whereas the western end of the line actually runs northwestwardly. But the fact remains that the Dry Tortugas are in fact located south and west of Fowey Rocks so that the line connecting them may fairly be said in a general sense to run southwestwardly. Likewise the line defining the boundary along the Gulf coast of the mainland north of the area here under discussion is defined as running "northwestwardly three leagues from the land, to a point west of the mouth of the Perdido river". A long section of this line runs northeastwardly and another section southwestwardly but the mouth of the Perdido river is unquestionably north and west of Cape Sable and Cape Romano and the line as a whole may, therefore, fairly be described as running "northwestwardly". I am satisfied, therefore, that the use of the term "northeastwardly" does not eliminate the possibility of a boundary which in certain places deviates from that general direction so long as one terminal point is definitely north and east of the other.

A determination that this segment of the State boundary runs to the northeast on a heading of 045° from north would result in the inclusion within the State of a very large roughly semicircular area of comparatively deep water of the continental shelf in the Gulf of Mexico. The greater part of this area has never been claimed as part of its territorial sea by the United States which regards it as international waters. Moreover, the great weight of the evidence before me, consisting of ancient documents

received as exhibits and the testimony of expert witnesses, establishes, and I find, that in 1868 and prior thereto the interests of the State of Florida and its residents in this area were almost entirely limited to the taking of sponges, turtles and fish in the comparatively shallow waters, less than three fathoms deep, adjacent to the Keys and in the channels between them. It appears that in those days activities, other than shipping, in the area of deeper water to the north and west of the Keys were very minimal and the economic interests of southern Florida did not extend seaward into that area to any substantial extent. There is no evidence to indicate, and I do not believe, that the framers of the 1868 Constitution gave actual attention to this large area of the Gulf of Mexico or intended to include it within the State boundaries.

But, on the other hand, I find no basis whatever in the record to support the contention of the United States that the "northeastwardly" boundary was intended by the framers of the 1868 Constitution to run from the five-fathom line north of the Dry Tortugas to the five-fathom line north of the "New Ground" shallows and thence to the three-fathom line north of the Marquesas and to follow that line north of the Keys to its intersection with a three-league arc centered at Northwest Cape on Cape Sable. Moreover, that construction of the constitutional language is in my opinion precluded by the presence of certain other indicia as to the location of this portion of the boundary and to the consideration of these I now turn.

It is evident from the language of the constitutional boundary description that its framers were familiar with and adopted the idea of claiming a boundary three leagues offshore in the Gulf of Mexico. For in the description of the final segment of the boundary along the Gulf coast of the mainland of the State this precise three-league boundary is described and claimed. Moreover, in the description of the very segment of the boundary which we are now considering the three-league boundary is mentioned

as the terminal point. Accordingly, in the absence of anything to the contrary in the phrase "thence northeastwardly to a point three leagues from the mainland", I think it is permissible to infer that the northeastwardly line was itself intended to run three leagues from the Dry Tortugas and the coast of the Keys and the seaward limit of inland waters to a point three leagues from the mainland. And in my opinion this conclusion is compelled by the 1962 amendment to the Constitution of the State. That amendment has already been discussed in connection with its effect on the boundary of the State along the Atlantic coast. I note at this point that the 1962 amendment dealt with the boundary on the Gulf also. With respect to the Gulf coast, however, the amendment made no seaward extension of the boundary as it did with the boundary along the Atlantic coast. The Gulf coast boundary was still limited to a line three leagues distant from the coast. But the amendment defined the line in somewhat more precise terms. Thus by the 1962 amendment the former description of the segment of the boundary which we are now considering, namely, "thence northeastwardly to a point three leagues from the mainland", was amended to read "thence northeastwardly, three (3) leagues distant from the coast line, to a point three (3) leagues distant from the coast line of the mainland". In my opinion the boundary described in this amendment is not inconsistent with the boundary described in the 1868 Constitution but rather is intended to give definiteness and precision to the more general and indefinite language used in that Constitution.

But even if we should assume, for the purpose of discussion, that there is merit in this contention of the State of Florida the end result would still be the same. For if its 1868 boundary in this area should be assumed to be a straight line drawn from the Dry Tortugas to the vicinity of Cape Romano, the effect of the 1962 Constitutional amendment would be to withdraw the boundary

claim of the State to the three-league line north and west of the coastline of the Florida Keys which that amendment calls for. The effect of this would clearly be to give up the jurisdiction of the State over the area from which it had thus withdrawn and in the seabed of which the United States has claimed a proprietary interest since the year 1945. It is true that by a constitutional revision in 1968 the State redefined this segment of its boundary as "thence northeast along a straight line to a point three leagues from the coastline of Florida". However, the State could not in this way validly recapture, without the consent of the United States, territory and jurisdiction relinquished in 1962 to the federal government, if that was in fact the effect of the 1962 amendment. Nor could it thus, without the consent of the United States, extend its boundaries into the Gulf of Mexico, if the northeastwardly boundary claimed in the 1868 Constitution was in fact, as I have found, the northeastwardly boundary more precisely defined in the 1962 Constitutional amendment.' *United States v. Texas*, 1950, 339 U.S. 707, 720.

The conclusion to which I have come with respect to the segment of the State boundary in the Gulf of Mexico north of the Dry Tortugas and the Florida Keys is consistent with the previous opinion and decree of the Court in No. 9 Original. The Court was there called upon to determine the extent of the grant of submerged lands and resources in the Gulf of Mexico which was effected by the Submerged Lands Act of 1953. That Act, which is discussed earlier in this report, purported to vest in the Gulf States the submerged lands and resources out to their respective boundaries as they existed upon admission to the Union or as they had been approved by Congress, but in no event to a distance of more than three leagues into the Gulf of Mexico. The Court was thus required to ascertain the location of the Congressionally approved boundary of the State of Florida in order to determine the extent of the grant to the State made by the Act. In its opinion

the Court stated that "Congress in 1868 did approve Florida's claim to a boundary three leagues from its shores", and held that "the Submerged Lands Act grants Florida a three-marine-league belt of land under the Gulf, seaward from its coastline, as described in Florida's 1868 Constitution." 363 U.S. 121, 128-129. Likewise in the decree entered pursuant to that opinion it was adjudged that as "against the United States, the defendant States are respectively entitled to all the lands, minerals and other natural resources underlying the Gulf of Mexico, extending seaward from their coast lines for a distance of three leagues in the case of . . . Florida. . . ." 364 U.S. 502. No exception is noted in either opinion or decree for that portion of the coastline of the State in the Gulf of Mexico lying along the northern shores of the Dry Tortugas and the Florida Keys. While it may be that this particular portion of the 1868 boundary was not in focus in the formulation of that decision, the decision would nonetheless seem clearly and expressly to adjudicate it. In any event my conclusion with respect to the boundary conforms to it. It must, of course, be remembered that the approval of a three-league boundary in the Gulf of Mexico was for purely domestic purposes, such as the delimitation of the rights of the State under the Submerged Lands Act, and was not necessarily effective as against foreign nations in view of the fact that the United States has never claimed a belt of territorial sea exceeding three miles in width. See *United States v. Louisiana*, 1960, 363 U.S. 1, 30-36, 64.

Since there is an expanse of at least 35 miles of open water between the Dry Tortugas Islands and the westernmost of the Marquesas Keys and since, admittedly, the 1868 boundary of the State encompasses both, the boundary must, of necessity, be projected in a straight line from the three-league line north of the Dry Tortugas to the three-league line north of the Marquesas and the other lower Florida Keys. Moreover, since, as appears later in this report, I have found that the waters of Florida Bay, properly

limited and defined, are inland waters of the State, the 1868 State boundary must be three leagues seaward of the line marking the seaward limit of those inland waters.

I accordingly find that the section of the 1868 boundary of the State of Florida between the Dry Tortugas Islands and the mainland may be more precisely defined and located as follows:

> Beginning at a point on the five-fathom contour line south of Loggerhead Key, the westernmost of the Dry Tortugas Islands, where that line intersects the parallel of 24° 35′ north latitude; thence due west in latitude 24° 35′ north to a point in longitude 83° west; thence due south in longitude 83° west to a point three marine leagues southwestwardly from Loggerhead Key or any low-tide elevation which is southwestwardly from Loggerhead Key and within three geographical miles thereof; thence in a general northwardly and northeastwardly direction three marine leagues from the coastline of the Dry Tortugas Islands and low-tide elevations to a point north of East Key; thence southeastwardly in a straight line to a point three marine leagues from the ordinary low-water line of the north coast of the Marquesas Keys; thence northeastwardly three marine leagues from the ordinary low-water line of the coast of the Marquesas Keys and three marine leagues from the ordinary low-water line of the coast of the Florida Keys and three marine leagues from the line marking the seaward limit of the inland waters of Florida Bay to a point three marine leagues from the ordinary low-water line of the mainland.

(d) *"thence northwestwardly three leagues from the land, to a point west of the mouth of the Perdido river; thence to the place of beginning."*

There is no dispute between the parties as to the

location of this final segment of the boundary along the western coast of the mainland of the State from Florida Bay to the Perdido river. It has been definitely adjudicated by the Court to be a line at the distance of three leagues seaward from the coastline. 363 U.S. 121, 128; 364 U.S. 502. Its location in the vicinity of the mouth of the Perdido river is precisely defined in the 1962 Constitutional amendment.

I accordingly find that the segment of the 1868 boundary of the State of Florida between Florida Bay and the Perdido river is located as follows:

> Beginning at the point where a line three marine leagues from the seaward limit of Florida Bay intersects a line three marine leagues from the coast of the mainland of the State; thence in a general northwestwardly direction three marine leagues from the ordinary low-water line along the coast and the line marking the seaward limit of inland waters to a point west of the mouth of the Perdido river and three marine leagues distant therefrom, as measured on a line bearing 0° 01′ 00″ west therefrom; and thence along the said line to the mouth of the Perdido river in latitude 30° 16′ 53″ north and longitude 87° 31′ 06″ west, the place of beginning.

6. The location of the present State boundaries for the purposes of the Submerged Lands Act.

The findings which I have made with respect to the precise location of the boundary line of the State of Florida as described in its 1868 Constitution have been made at the request of the parties. As I have already pointed out, however, the Submerged Lands Act of 1953 expressly authorized the State to extend its existing boundary in the Atlantic Ocean a full three geographical miles seaward from its Atlantic coastline. The Florida Act of May 31, 1955 and its 1962 Constitutional amendment took

advantage of this statutory authority to extend out to the three-mile limit those portions of its Atlantic coastal boundary which lie along the coast or within three miles of it. Being thus expressly authorized by the Submerged Lands Act, this revised Atlantic coastal boundary is the boundary on that coast approved by Congress within the meaning and for the purposes of the Act, and is, therefore, in my opinion the only Atlantic coastal boundary which is of any significance in this proceeding. A further seaward extension of the northern section of the Atlantic coastal boundary purporting to have been made by the Florida revised Constitution of 1968 does not meet the definition of the Submerged Lands Act and has not been approved by Congress. It is, therefore, of no significance in determining the issues involved in this proceeding.

Under both the 1868 Constitution and the 1962 Constitutional amendment the State boundary is described as extending to and around the Dry Tortugas Islands. By this description the boundary is made to include a large area of open water between the Marquesas Keys and the Dry Tortugas which is more than three geographical miles or even three marine leagues from the coastline of either of those groups of islands. The Submerged Lands Act provides, as we have seen, that for the purposes of that Act a state boundary may not "be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean . . . , or more than three marine leagues into the Gulf of Mexico". Accordingly, the area of open water in the Atlantic Ocean more than three miles from the coastlines of the Marquesas Keys and the Dry Tortugas Islands and in the Gulf of Mexico more than three leagues therefrom cannot be included within the boundaries of the State of Florida for the purposes of defining the grant of the seabed and its resources made by the Submerged Lands Act. Whether this area of open water between the Marquesas and the Dry Tortugas may be considered to be within the boundaries of the State for

other purposes is not involved in this proceeding and need not now be decided. As I have already pointed out, the line between the Atlantic Ocean and the Gulf of Mexico in this area follows the meridian of 83° west longitude north from Cuba to the parallel of 24° 35′ north latitude and follows that parallel east to the Marquesas Keys.

I accordingly find that the present marine boundary of the State of Florida within the meaning of the Submerged Lands Act and which is effective for the purposes of that Act, on both the Atlantic and Gulf coasts, may be precisely defined and located as follows:

> *Marine boundary of the mainland and Florida Keys.* Beginning at a point in the middle of the St. Mary's river at its mouth in the Atlantic Ocean north of Amelia Island, and extending thence seaward in the Atlantic Ocean three geographical miles from the coastline; thence in a general southerly direction following the coastline of the State and of the Florida Keys and three geographical miles seaward therefrom to a point in latitude 24° 35′ north which is three geographical miles westwardly from the coast of the most westerly of the Marquesas Keys; thence due west in latitude 24° 35′ north to a point which is three marine leagues westwardly from the most westerly of the Marquesas Keys; thence in a general northerly direction following the coastline of the Marquesas Keys, the lower Florida Keys, the seaward limit of the inland waters of Florida Bay and the coastline of the mainland and three marine leagues seaward therefrom to a point west of the mouth of the Perdido river and three marine leagues distant therefrom; and thence to the mouth of the Perdido river.

The Dry Tortugas Islands are a part of the territory of the State of Florida. They were included within the State boundary described in the State Constitution of 1868 which, as we have seen, was approved by Congress in

1868 and their status as Florida territory has never been questioned. But for the purposes of the State boundary recognized by the Submerged Lands Act these islands must be regarded as constituting detached insular territory of the State with a separate boundary of their own. Applying the principles heretofore discussed, I find that the boundary of the State in the area of the Dry Tortugas Islands may be defined as follows:

> *Marine boundary of the Dry Tortugas Islands.* Beginning at a point in latitude 24° 35′ north three geographical miles southeastwardly from the coastline of Garden Key or any low-tide elevation which is southeastwardly from Garden Key and within three geographical miles thereof; thence in a general westwardly direction following a line three geographical miles seaward from the coastline of the nearest of the Dry Tortugas Islands and low-tide elevations to a point in latitude 24° 35′ north three geographical miles southwestwardly from Loggerhead Key or any low-tide elevation which is southwestwardly from Loggerhead Key and within three geographical miles thereof; thence due west in latitude 24° 35′ north to a point in longitude 83° west; thence due south in longitude 83° west to a point three marine leagues southwestwardly from Loggerhead Key or any low-tide elevation which is southwestwardly from Loggerhead Key and within three geographical miles thereof; thence in a general northwestwardly, eastwardly, and southwardly direction following a line three marine leagues seaward from the nearest of the Dry Tortugas Islands and low-tide elevations to a point in latitude 24° 35′ north; and thence due west in latitude 24° 35′ north to the place of beginning.

Included in the appendix is a reproduction of a section of Coast & Geodetic Survey Chart C. & G.S. 1113 [United States Exhibit No. 37] on which are indicated the boundary

lines claimed by the State of Florida and the United States, respectively, and the boundary line of the State in the disputed area as recommended above by me. On Coast & Geodetic Survey Charts C. & G.S. 1250, 1251 and 1253 also reproduced in the appendix, is indicated the seaward limit of the inland waters of Florida Bay and on Coast & Geodetic Survey Charts C. & G.S. 1251, 1252, 1253 and 1351, likewise reproduced in the appendix, is indicated the location of portions of the boundary line of the State in the Gulf of Mexico as recommended above by me. [Charts C. & G.S. 1250, 1251, 1252, 1253 and 1351 are parts of United States Exhibit No. 101].

7. The character and extent of Florida Bay as a juridical or historic bay constituting inland waters of the State.

It remains to define the coastline of the State of Florida which constitutes the baseline seaward from which, three geographical miles in the Atlantic Ocean and three marine leagues in the Gulf of Mexico, the marine boundaries of the State are located. Before doing so, however, a preliminary problem must be dealt with. This involves the area of the Gulf of Mexico between the Florida Keys and the mainland of the State lying southeast of a straight line bearing 045° from north running from the Dry Tortugas to the vicinity of Cape Romano which entire area the State calls Florida Bay and which it claims to be inland waters of the State on the basis, as it contends, that the area comprises a juridical bay or that it has historically been treated as inland waters of the State.

Section 2(c) of the Submerged Lands Act defines the term "coast line" as meaning "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters". The parties by the stipulation contained in their joint prehearing statement have agreed that the determination of the coastline shall be governed

by pertinent articles of the Convention on the Territorial Sea and the Contiguous Zone. 15 U.S.T. (Pt. 2) 1606. This accords with the decision of the Court in *United States v. California,* 1965, 381 U.S. 139, 164-165, which held that the definitions supplied by that Convention should be followed in determining the meaning of "inland waters" and other similar, but undefined, phrases used in the Submerged Lands Act. Article 7 of the Convention defines and deals with what we may call juridical bays. That article is as follows:

"ARTICLE 7

"1. This article relates only to bays the coasts of which belong to a single State.

"2. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

"3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water areas of the indentation.

"4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn

between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

"5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

"6. The foregoing provisions shall not apply to so-called 'historic' bays, or in any case where the straight baseline system provided for in article 4 is applied."

It will be seen that the Convention lays down two criteria for a juridical bay. It must be a well-marked indentation of the coast which contains landlocked waters. The length of the closing line marking the seaward limit of the inland waters of the bay must not exceed 24 miles. Neither of these criteria is met by the area which the State of Florida claims as Florida Bay. The distance between the Dry Tortugas and Cape Romano, the two entrance points to that area which the State regards as the termini of the closing line of the bay, is about 100 miles, vastly more than the 24 miles stipulated by the Convention, and the enclosed waters are not landlocked, since the Dry Tortugas, the Marquesas Keys and the other lower Florida Keys which enclose the area on the south are all islands with channels of open water between them connecting the waters of the Gulf of Mexico to the north with the waters of the Straits of Florida to the south. The vast area claimed as a juridical bay by the State of Florida is, therefore, not a bay, the waters of which are internal waters of the State, within the controlling definition of the Convention on the Territorial Sea and the Contiguous Zone.

I do not think that this conclusion need be reached

with respect to the most easterly portion of this area, however, namely, the area between the mainland on the northwest and the upper Florida Keys on the southeast which lies east of a closing line running southwesterly from East Cape of Cape Sable to Knight Key in the Florida Keys, a distance of approximately 24 geographical miles. This area comprises for the most part very shallow water which is not readily navigable and nearly all of which is dotted with small islands and low-tide elevations. I find that this area is sufficiently enclosed by the mainland and the upper Florida Keys, which constitute realistically an extension of the mainland, to be regarded as a bay which constitutes inland waters of the State within the test applied in *United States v. Louisiana,* 1960, 363 U.S. 1, 66-67, fn. 108, and *United States v. Louisiana,* 1969, 394 U.S. 11, 60-66, and discussed in *United States v. California,* 1965, 381 U.S. 139, 171. Moreover, the character of this area as inland waters of the State of Florida appears to be conceded by the United States. It is this area which I designate in this report as Florida Bay. But the claim of the State to the waters of the Gulf of Mexico to the west of this area as a juridical bay must, in my opinion, be rejected.

I turn then to consider the proposition upon which the State of Florida places its principal reliance, namely, that the waters of the extensive area which it claims as Florida Bay are historically inland waters of the State, an historic bay within the meaning of the saving clause of paragraph 6 of Article 7 of the Convention on the Territorial Sea and the Contiguous Zone. In *United States v. California,* 1965, 381 U.S. 139, the Court was called upon to pass upon the claim of the State of California that certain bays along its coast were "historic bays" the waters of which were, for that reason, historic inland waters of the State. Discussing the legal concept of "historic bays" in international law and referring to Juridical Regime of Historic Waters, Including Historic Bays, U.N. Doc. A/CN. 4/143 (1962), the Court said [p. 172]:

> "Essentially these [historic bays] are bays over which a coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations."

In rejecting the claims of the State of California, the Court pointed out that "The United States disclaims that any of the disputed areas are historic inland waters," and said [p. 175]:

> "We are reluctant to hold that such a disclaimer would be decisive in all circumstances, for a case might arise in which the historic evidence was clear beyond doubt. But in the case before us, with its questionable evidence of continuous and exclusive assertions of dominion over the disputed waters, we think the disclaimer decisive."

In *United States v. Louisiana*, 1969, 394 U.S. 11, the Court was faced with similar problems with respect to the coastline of the State of Louisiana. In discussing the doctrine of the international law relating to historic internal waters the Court, while pointing out [p. 75] that there is no universal accord on its exact meaning, stated in footnote 27 [pp. 23-24]:

> "27. A recent United Nations study recommended by the International Law Commission reached the following conclusions:
>
> " 'There seems to be fairly general agreement that at least three factors have to be taken into consideration in determining whether a State has acquired a historic title to a maritime area. These factors are: (1) the exercise of authority over the area by the State claiming the historic right; (2) the continuity of this exercise of authority; (3) the attitude of foreign States. First, the State must exercise authority over the area in question in order to acquire a historic title to it. Secondly, such exercise of authority must

> have continued for a considerable time; indeed it must have developed into a usage. More controversial is the third factor, the position which the foreign States may have taken towards this exercise of authority. Some writers assert that the acquiescence of other States is required for the emergence of an historic title; others think that absence of opposition by these States is sufficient.' Juridical Regime of Historic Waters, Including Historic Bays, [1962] 2 Y.B. Int'l L. Comm'n 1, 13, U. N. Doc. A/CN. 4/143 (1962)."

From these opinions of the Court and the authorities upon which they rely, I conclude that the criteria for establishing the existence of an historic bay or historic inland waters are three. First, there must be an open, notorious and effective exercise of sovereign authority over the area not merely with respect to local citizens but as against foreign nationals as well; second, this authority must have been exercised for a considerable period of time; and, third, foreign states must have acquiesced in the exercise of this authority as against their nationals.

The extent of the limits of sovereign jurisdiction in the maritime belt along the coasts of the United States is a political question for the federal government, to be determined by its legislative and executive branches. *United States v. California*, 1947, 332 U.S. 19, 33-34. It would follow that a disclaimer by the United States of jurisdiction in any part of that area should, as the Court indicated in *United States v. California*, 1965, 381 U.S. 139, 175, ordinarily bar any claim to such jurisdiction by the state involved. The Court there pointed out, however, as we have seen, that the evidence supporting a state's historic claim might be clear beyond doubt, in which case the federal disclaimer would not be decisive. And in *United States v. Louisiana*, 1969, 394 U.S. 11, 75-77, the Court held that in a controversy in this field between a state and the United States, the state may, in support of

its claim to historic inland waters, rely upon evidence of its own state activities in the area as well as any activities of the United States.

In the present case, the United States takes the position that it has disclaimed any historic title to or sovereign jurisdiction over the extensive area which the State of Florida claims as Florida Bay. In *United States v. California*, 1965, 381 U.S. 139, the disclaimer of the United States in the litigation itself was held sufficient to bar the state claim. Here there is not only disclaimer in the litigation but additional evidence of activities and statements by officials of the United States of continued disclaimers of historic title to the waters in question. Included in this evidence is a series of maps of the coastline [United States Exhibit No. 101] which indicate the extent of the claim of the United States to the territorial sea along the coast of Florida and which were furnished to foreign nations for their information. The burden, therefore, is cast upon the State of Florida to establish by historic evidence which is "clear beyond doubt" that its historic claim meets the three criteria which I have described above and may, therefore, be sustained as against the federal disclaimer.

I turn then to consider the evidence which the State of Florida has offered in support of its claim. First, of course, is the boundary claimed by the 1868 Constitution approved by Congress which it asserts includes the entire area southeast of a straight line bearing 045° from north from the Dry Tortugas to Cape Romano which entire area it calls Florida Bay, as I have said, and claims as historic inland waters. If its construction of the boundary language is correct, which I have concluded it is not, this 1868 origin of its claim would certainly be remote enough in time to satisfy the second criterion for historic inland waters.

The first and third criteria, however, must also be met. The State must show that it, or the United States, exercised open, notorious and effective sovereign authority

in the area as against the nationals of foreign states and that the foreign states acquiesced in this exercise of authority. As to this, the evidence submitted by the State is limited indeed. There is no evidence whatever that the federal government either claimed or exercised such authority over the area beyond the coastal belt of territorial sea recognized by maritime states. The evidence offered by the State that in 1826 a federal revenue cutter drove off "Bahama Turtlers who have heretofore occupied the Florida coast in pursuit of that employment" [Florida Exhibit No. 74], seems clearly to have related to the belt of territorial sea along the coasts of the Keys and the shallow waters between them where it appears that turtles were taken. The exercise of authority within that coastal belt would, of course, have no bearing at all on the question whether sovereign authority had been exercised and enforced on the high seas beyond the limits of that belt.

The State offered a series of maps dating back to 1854 which more or less clearly designate as Florida Bay the area now claimed by the State as its internal waters. I find, however, that this area has not been consistently treated by geographers and cartographers as a bay. Moreover, such a designation throws little or no light on the question whether the State actually exercised sovereign authority in the area.

The most common exercise of sovereignty in inland waters is the special control and, often, prohibition of navigation by foreign vessels and of fishing by foreign nationals. The State of Florida offered no evidence that either it or the federal government had ever attempted to control or prohibit the mere navigation by foreign vessels of the area in question. There is evidence, however, that as early as December 17, 1845, shortly after its admission to the Union, the State of Florida passed an act (Chapter 34) prohibiting non-residents without a license from taking fish in Florida waters for export or sale. This act was superseded on February 12, 1861 by an act(Chapter 1121)

which prohibited non-citizens of the State without a license from taking fish or turtle "on the coast, or in any of the seas, bays, rivers, creeks or harbors, or within a marine league of the coasts of said State" for export or sale. In 1893 the State passed an act (Chapter 4212) prohibiting non-citizens of the United States from catching food fishes for sale or export "in the public waters of the State" or without a license from taking "any fish within the jurisdiction of the State" for other than their own individual use. And in 1915 the State passed an act (Chapter 6877) declaring "all fish in the rivers, bayous, lagoons, lakes, bays, sounds and inlets bordering on or connected with the Gulf of Mexico or the Atlantic Ocean, or in the Gulf of Mexico or Atlantic Ocean, within the jurisdiction of the State of Florida" to be, and to continue and remain, the property of the State, to be taken and used by citizens and non-citizens under the restrictions and conditions imposed by the Act. It will be seen that all of these acts relate to the taking of fish within the "public waters of the State" or "within the jurisdiction of the State" without indicating except in one instance the distance from the coast to which those waters or that jurisdiction extended. And in the Act of 1861 which did specify that distance it was stated to be one marine league. The reference to "bays" in some of these acts was certainly inadequate to refer to the large expanse of the Gulf of Mexico which the State of Florida now claims as a bay. These acts appear to furnish little or no support for a finding that the State exercised authority in that area.

In 1957, subsequent to the enactment of the Submerged Lands Act, the State of Florida passed an act (Chapter 57-358) prohibiting shrimping by anyone in certain portions of the area with which we are here concerned, which the director of the Department of Conservation was authorized to close from time to time in the interest of conserving shrimp. These areas are described as the Tortugas shrimp bed. This Act was amended in

1961 (Chapter 61-470), and further amended in 1970 (Chapter 70-163) to extend the area of the Tortugas shrimp bed.

In 1963 the State enacted the Florida Territorial Waters Act (Chapter 63-202) the purpose of which was to exercise and exert full sovereignty and control over the territorial waters of the State. Section 4 of the Act made it unlawful for any unlicensed alien vessel to take any natural resource of the State's "territorial waters, as such waters are described by article 1 of the Constitution of Florida." It will be recalled that in 1963 the constitutional boundaries which described and delimited the territorial waters of the State were those set out in the 1962 Constitutional amendment and on the Gulf coast ran three marine leagues offshore from the Dry Tortugas, the Florida Keys and the mainland of the State. The Florida Territorial Waters Act, as enacted in 1963, accordingly did not purport to apply to the area beyond the three-league limit which is here in dispute.

Randolph Hodges, Executive Director of the Florida State Department of Natural Resources, testified that between 1957 and 1968 his department considered the State boundary north of the Keys to begin at the Dry Tortugas and run generally parallel with the Keys along their northern side back toward the mainland. It was in 1968, as we have seen, that the Constitutional boundary was extended out into the Gulf to enclose the entire area here in question. It seems clear from the evidence that the State of Florida has never, before or since 1968, seized a foreign vessel in the disputed area beyond the three-league limit for violating its laws. Mr. Hodges so testified and Dr. Samuel Proctor, another witness for the State, corroborated this fact. The nearest approach to a suggestion of such action is a statement in the complaint filed on December 18, 1970 by the United States against the State of Florida in the United States District Court for the Northern District of Florida, Civil Action No. 1672, Talla-

hassee, that the State of Florida was threatening to arrest foreign boats fishing for shrimp in the area in dispute. It was not alleged, however, that the State had actually done so.

The only other evidence in support of the State's claim to the area in dispute which need be mentioned is the fact that the State on October 4, 1941 granted an option to lease large tracts of submerged lands in the area for oil exploration. Leases were subsequently granted to private individuals and corporations in 1944, 1949 and 1951. Actual exploration was conducted with negative results and the leases expired in 1964 and were not renewed. It will be seen that the leases were given only nine years, at the earliest, before the enactment of the Submerged Lands Act and have all since terminated. They do not disclose a usage sufficiently remote in time to meet the second criterion for historic inland waters. Nor do I think that they afford evidence of a use adverse to foreign nations in light of the accepted view in recent years that maritime nations have special rights in the bed of the continental shelf off their coasts.

The State of Florida is here claiming that all the waters of the Gulf of Mexico southeast of a straight line from the Dry Tortugas running due northeast to Cape Romano on the mainland are historic inland waters of the State. I am satisfied, however, that the evidence offered in support of this claim does not meet the test of being clear beyond doubt. The claim must, therefore, be rejected. However, as I have already indicated, that portion of the area lying east of a straight line from the East Cape of Cape Sable to Knight Key is a juridical bay, the waters of which are inland waters of the State of Florida. It is this area which I have designated Florida Bay in this report.

Before concluding my discussion of Florida Bay I should point out that it could be argued that the lower

Florida Keys, being basically part of the same partly submerged limestone reef as the upper Keys, should likewise realistically be regarded as an extension of the mainland and that, accordingly, Key West, rather than Knight Key, is the natural southern entrance point of Florida Bay. Under this theory the closing line marking the seaward limit of the inland waters of Florida Bay would have to be drawn from the East Cape of Cape Sable to the Spanish Banks low-tide elevation which is about two miles northeast of Big Spanish Key. This would provide a closing line approximately 24 miles long, the maximum length for such a line which is permitted by paragraph 4 of article 7 of the Convention on the Territorial Sea and the Contiguous Zone. I have not accepted this alternative, however, because of the existence of a gap in the chain of the Keys just west of Knight Key, through which gap passes the Moser Channel between the Straits of Florida and the Gulf of Mexico with navigable depths of water of from 10 to 15 feet. I have concluded that this navigable channel so far separates the lower Florida Keys from the upper Keys as to negate a finding that the former should be regarded as a further extension of the mainland.

8. The location of the coastline of the State.

It is necessary to define and locate the coastline of the State of Florida because it comprises the baseline seaward from which the boundaries of the State are to be measured and located. In proceeding to define this coastal baseline I am met at the threshold by the contention of the State that the system of straight baselines must be used for this purpose in the region of the Florida Keys and the Dry Tortugas. The situations in which such straight baselines may be used and the effect of their use are set out in Articles 4 and 5 of the Convention on the Territorial Sea and the Contiguous Zone, as follows:

"ARTICLE 4.

"1. In localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

"2. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.

"3. Baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them.

"4. Where the method of straight baselines is applicable under the provisions of paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage.

"5. The system of straight baselines may not be applied by a State in such a manner as to cut off from the high seas the territorial sea of another State.

"6. The coastal State must clearly indicate straight baselines on charts, to which due publicity must be given."

"ARTICLE 5.

"1. Waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.

"2. Where the establishment of a straight baseline in accordance with article 4 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage, as provided in articles 14 to 23, shall exist in those waters."

The parties have stipulated, as we have seen, that the determination of the coastline shall be governed by pertinent articles of the Convention and the State urges that Article 4 specifically authorizes the employment of the method of straight baselines for this purpose in an insular area such as the Florida Keys. This may be conceded but the concession does not support the State's position. For the Court has expressly held "that the choice under the Convention to use the straight-base-line method for determining inland waters claimed against other nations is one that rests with the Federal Government, and not with the individual States." *United States v. California,* 1965, 381 U.S. 139, 168. This position was reaffirmed by the Court in *United States v. Louisiana,* 1969, 394 U.S. 11, 72-73.

The evidence in this case conclusively establishes that the United States has not adopted the straight baseline method with respect to the determination of the coastline of the State of Florida. Therefore, for determining the location of the coastline we must apply the criteria which are supplied by the Submerged Lands Act, namely, the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters. In applying these criteria in the case of islands which realistically, within the rule applied in *United States v. Louisiana,* 1969, 394 U.S. 11, 60-66, should be treated as extensions of the mainland and as enclosing the inland waters of a bay, such, for example, as Key Biscayne, Key Largo, Plantation Key, Upper and Lower Matecumbe Keys, Long Key and Vaca Key, the line of ordinary low water along that portion of their coast which is in direct contact with the open sea

should be treated as part of the coastline of the mainland. *United States v. Louisiana*, 1960, 363 U.S. 1, 66-67, fn. 108. Likewise the seaward limits of bays, harbors and river mouths, as defined by Articles 7, 8 and 13, respectively, of the Convention on the Territorial Sea and the Contiguous Zone, constitute part of the coastline of the mainland, and the same applies to the western seaward limit of Florida Bay, as I have defined it, which will also constitute a part of the coastline of the State. In the case of an island belonging to the State which is not within or contiguous to inland waters of the State, its entire coast constitutes a baseline for determining part of the boundary of the State as indicated by Article 10 of the Convention on the Territorial Sea and the Contiguous Zone. In the case of a low-tide elevation situated wholly or partly within three geographical miles from the coastline of the mainland or of an island, the low-water line of that elevation may also be used as the baseline for determining part of the boundary of the State as indicated by Article 11 of the Convention on the Territorial Sea and the Contiguous Zone.

The text of Article 7 of the Convention is set out in the discussion of Florida Bay earlier in this report. Articles 8, 10, 11 and 13 are as follows:

"ARTICLE 8.

"For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast."

"ARTICLE 10.

"1. An island is a naturally-formed area of land, surrounded by water, which is above water at high-tide.

"2. The territorial sea of an island is measured in accordance with the provisions of these articles."

"ARTICLE 11.

"1. A low-tide elevation is a naturally-formed area of land which is surrounded by and above water at low-tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.

"2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own."

"ARTICLE 13.

"If a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low-tide line of its banks."

These provisions of the Convention by their language deal only with the location of the baseline from which the breadth of the territorial sea is to be measured. However, the baseline which they define is identical with the coastline as defined by the Submerged Lands Act, and the outer limit of the territorial sea to which they refer, which is three miles seaward from the coastline, is identical with the maritime boundary on the Atlantic coast to which I have found the State of Florida to be entitled for the purposes of the Submerged Lands Act. These provisions of the Convention are thus, as the parties have stipulated, directly applicable to the determination of the location of the coastline for boundary purposes in this proceeding.

The United States offered in evidence a series of Coast and Geodetic Survey charts of the entire coastline of the State of Florida from the mouth of the St. Mary's river to the mouth of the Perdido river, including the Florida Keys and the Dry Tortugas Islands. [United States Exhibit No. 101]. On each chart the Federal Government has drawn lines three geographical miles and 12 geographical miles, respectively, seaward from the coastline to identify the territorial sea and the contiguous zone. The charts are designated C. & G.S. Nos. 1242 to 1265, inclusive, and 1351. They have been distributed by the Federal Government to foreign governments upon their request for information as to the limits of the territorial sea and contiguous zone claimed by the United States. The location of the coastline between the St. Mary's river and the seaward limit of Biscayne Bay, and from Cape Sable to the mouth of the Perdido river as claimed by the United States and not contested by the State of Florida may be ascertained from Charts C. & G.S. 1242 to 1248, inclusive, and 1253 to 1265, inclusive.

The coastline on the Atlantic Ocean south of Biscayne Bay follows the ordinary low-water mark on the southeastern or seaward coast of the islands in the chain of the upper Florida Keys and the low-tide elevations adjacent to them as far west as Knight Key off the western tip of Vaca Key, with closing lines from key to key to delimit the inland waters lying between and to the north of them. From Knight Key the coastline follows the seaward limit of Florida Bay in a straight line northeastwardly to the East Cape of Cape Sable. The remaining islands, in the main chain of the Keys west of Knight Key, comprise three groups which may be considered separately, the lower Florida Keys from Money Key to Key West, the Marquesas Keys and the Dry Tortugas Islands. In the case of each group the narrow waters within the group are inland waters of the State of Florida and the coastline follows the ordinary low-water line along those portions

of the coast of the outer islands and low-tide elevations of the group which are in direct contact with the open sea and straight lines drawn between those islands and low-tide elevations to mark the seaward limit of the inland waters between and behind them. The islands, keys, and adjacent low-tide elevations, together with those rocks which protrude above ordinary high-water, on the Florida Reefs and elsewhere not in the immediate vicinity of the main chain of the Florida Keys to which I have referred, have in each instance an individual coastline following the ordinary low-water mark along its coast, distinct from the coastline of the mainland and main chain of the Florida Keys. From these detached insular coastlines, segments of the State boundary are, of course, to be determined.

From the stipulation of the parties and the evidence, including particularly the charts of the Coast and Geodetic Survey designated C. & G.S. 1242, 1243, 1248, 1249 and 1250 which have been received in evidence and are included in the appendix to this report, I find that the following lines mark the outer limits of inland waters, and thus the coastline, at the places indicated:

(1) A line between the outer limits of the jetties at the mouth of the St. Mary's river;

(2) A line between the outer limits of the jetties at the mouth of the St. John's river;

(3) A line between Fisher Island and Virginia Key;

(4) A line between Virginia Key and Key Biscayne;

(5) A line between Cape Florida and Ragged Key;

(6) A line between Ragged Key and Boca Chita Key;

(7) A line between Boca Chita Key and Sands Key;

(8) A line across the mouth of Caesar Creek;

(9) A line across the mouth of Broad Creek;

(10) A line across the mouth of Angelfish Creek;

(11) A line across the mouth of Tavernier Creek;

(12) A line across the mouth of Snake Creek;

(13) A line between Windley Key and Upper Matecumbe Key;

(14) A line between Upper Matecumbe Key and Teatable Key;

(15) A line between Teatable Key and Indian Key;

(16) A line between Indian Key and Lower Matecumbe Key;

(17) A line between Lower Matecumbe Key and Craig Key;

(18) A line between Craig Key and the most easterly point of Long Key;

(19) A line between Long Key and the easternmost of the Conch Keys;

(20) A line between the Conch Keys;

(21) A line between the westernmost of the Conch Keys and Duck Key;

(22) A line between Duck Key and the Toms Harbor Keys;

(23) A line between the Toms Harbor Keys and Grassy Key;

(24) A line between Grassy Key and Crawl Key;

(25) A line between Crawl Key and the easternmost of the Deer Keys;

(26) Lines between each of the outer Deer Keys;

(27) A line between the southwesternmost of the Deer Keys and the low-tide elevation adjoining Vaca Key on the south;

(28) A line across the mouth of Sister Creek;

(29) A line between Boot Key and Knight Key;

(30) A line between Knight Key and the East Cape of Cape Sable.

The location of the foregoing closing lines is indicated on Coast and Geodetic Survey Charts C. & G. S. 1242, 1243,

1248, 1249 and 1250 which are included in the appendix. Their exact location may well have to be determined by the parties with greater precision hereafter. Likewise the location of the coastline of the lower Florida Keys from Money Key to Key West as a group, of the Marquesas Keys as a group, and of the Dry Tortugas Islands as a group, will have to be determined by the parties hereafter in accordance with the criteria hereinabove stated. It is impossible for me on the record now before me to make a precise determination of the location of the coastline of these three groups of islands so far as concerns the closing lines marking the seaward limits of the narrow inland waters lying between the islands of each group. If the parties are unable to agree as to any of these closing lines application for further supplementary proceedings to determine them should be authorized by the Court.

It should also be understood that the location of some or all of these closing lines may be modified by future changes in the shoreline.

C. CONCLUSIONS

The conclusions to which I have come with respect to the subsidiary questions involved in this case are stated in connection with my discussion of those questions earlier in this report and most of them need not be repeated here. My conclusions with respect to the ultimate question involved may be stated as follows:

1. The State of Florida, prior to May 22, 1953, did not have title to or ownership of the seabed or the resources thereof seaward from its coastline in either the Atlantic Ocean or the Gulf of Mexico.

2. By the Submerged Lands Act of May 22, 1953, 67 Stat. 29, Congress granted to the State of Florida title to and ownership of the portion of the seabed and the natural resources of the seabed lying within the State boundaries approved by Congress but in no event extending from the coastline of the State more than three geographical miles into the Atlantic Ocean or more than three marine leagues into the Gulf of Mexico.

3. The line dividing the Gulf of Mexico on the northwest from the Atlantic Ocean on the southeast begins at a point on the northern coast of the island of Cuba in 83° west longitude, and extends thence to the northward along that meridian of longitude to 24° 35′ north latitude; thence eastward along that parallel of latitude through Rebecca Shoal and the Quicksands Shoal to the Marquesas Keys; and thence through the Florida Keys to the mainland at the eastern end of Florida Bay; all the narrow waters between the Dry Tortugas, the Keys and the mainland being within the Gulf of Mexico.

4. The boundary of the State of Florida in the Atlantic Ocean is a line from the mouth of the St. Mary's river to the Dry Tortugas at the uniform distance of three geographical miles seaward from the Atlantic coastline of the State. That boundary, which is described and claimed

in Article I of the State Constitution as amended in 1962, is the State boundary authorized and approved by section 4 of the Submerged Lands Act. 43 U.S.C.A. §1312.

5. The boundary of the State of Florida in the Gulf of Mexico is a line from the Dry Tortugas to the mouth of the Perdido river at the uniform distance of three marine leagues seaward from the coastline of the State. That boundary, which is described and claimed in Article I of the State Constitution of 1868, carried forward without change in the Constitution of 1885, and clarified and more precisely defined by the Constitutional Amendment of 1962, is the historic State boundary approved by Congress within the meaning of section 2 of the Submerged Lands Act. 43 U.S.C.A. §1301.

6. The waters between the mainland and the upper Florida Keys which lie east of a straight line drawn between the East Cape of Cape Sable and Knight Key comprise Florida Bay and constitute inland waters of the State of Florida and the closing lines between the several upper Florida Keys and the said line between the East Cape of Cape Sable and Knight Key mark the seaward limit of those inland waters.

7. The marine boundaries of the State of Florida referred to in my Conclusions 4 and 5 above, which delimit the grant of the seabed and the natural resources of the seabed and sea which were made to the State by the Submerged Lands Act, may be more precisely defined as follows:

> *Marine boundary of the mainland and Florida Keys.* Beginning at a point in the middle of the St. Mary's river at its mouth in the Atlantic Ocean north of Amelia Island, and extending thence seaward in the Atlantic Ocean three geographical miles from the coastline; thence in a general southerly direction following the coastline of the State and of the Florida

Keys and three geographical miles seaward therefrom to a point in latitude 24° 35′ north which is three geographical miles westwardly from the coast of the most westerly of the Marquesas Keys; thence due west in latitude 24° 35′ north to a point which is three marine leagues westwardly from the most westerly of the Marquesas Keys; thence in a general northerly direction following the coastline of the Marquesas Keys, the lower Florida Keys, the seaward limit of the inland waters of Florida Bay and the coastline of the mainland and three marine leagues seaward therefrom to a point west of the mouth of the Perdido river and three marine leagues distant therefrom; and thence to the mouth of the Perdido river.

Marine boundary of the Dry Tortugas Islands. Beginning at a point in latitude 24° 35′ north three geographical miles southeastwardly from the coastline of Garden Key or any low-tide elevation which is southeastwardly from Garden Key and within three geographical miles thereof; thence in a general westwardly direction following a line three geographical miles seaward from the coastline of the nearest of the Dry Tortugas Islands and low-tide elevations to a point in latitude 24° 35′ north three geographical miles southwestwardly from Loggerhead Key or any low-tide elevation which is southwestwardly from Loggerhead Key and within three geographical miles thereof; thence due west in latitude 24° 35′ north to a point in longitude 83° west; thence due south in longitude 83° west to a point three marine leagues southwestwardly from Loggerhead Key or any low-tide elevation which is southwestwardly from Loggerhead Key and within three geographical miles thereof; thence in a general northwestwardly, eastwardly, and southwardly direction following a line three marine leagues seaward from the nearest of the Dry Tortugas

Islands and low-tide elevations to a point in latitude 24° 35′ north; and thence due west in latitude 24° 35′ north to the place of beginning.

8. The coastline from which are to be measured the boundaries of the State of Florida as defined in Conclusion 7 is the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters of rivers and bays. The Convention on the Territorial Sea and the Contiguous Zone governs the determination, for boundary purposes under the Submerged Lands Act, of the location of the coastline of the mainland, of islands and of low-tide elevations, and the definition and determination of inland waters of the State.

9. The State of Florida is entitled, as against the United States, to the seabed and all the natural resources of the seabed and the sea within the boundaries just described and the United States is entitled, as against the State of Florida, to the seabed and all the natural resources of the seabed and the sea of the continental shelf seaward from those boundaries.

D. RECOMMENDATIONS

I recommend that the parties be directed to submit to the Court forms of a declaratory decree in accord with the foregoing findings and conclusions and drawn with the necessary technical precision to carry them fully into effect.

The decree should provide that each party bear its own costs and that the expenses of the special master be borne by the parties in equal shares. It should also reserve the jurisdiction of the Court to entertain such further proceedings, enter such orders and issue such writs as may from time to time be deemed necessary or advisable to supplement the decree and give it proper force and effect.

Respectfully submitted,

JAN 18 1974

~~December , 1973~~

ALBERT B. MARIS
Special Master

PREHEARING ORDER AS AMENDED

I. PRELIMINARY STATEMENT

This case consists of a consolidation of proceedings for entry of a supplemental decree to delimit Florida's submerged lands in the Gulf of Mexico, in United States v. Louisiana, et al., No. 9, Original, and proceedings to delimit Florida's submerged lands in the Atlantic Ocean severed from United States v. Maine, et al., No. 35, Original. By orders of June 28, 1971, the Supreme Court permitted institution of the supplemental proceedings in No. 9, Original, ordered severance of proceedings as to Florida in No. 35, Original, and ordered consolidation of the two proceedings into the present case, No. 52, Original, all in accordance with joint motions filed by the parties in both cases and with the report and recommendation, previously approved by both parties, filed by the undersigned as special master in No. 35, Original. At the same time, the Court referred this consolidated case, No. 52, Original, to the undersigned as special master.

On January 8, 1971, the special master entered an order in No. 35, Original, allowing Florida to file an amended answer therein, and on January 28, 1971, the State of Florida filed its amended answer, together with a counterclaim and demand for jury trial. On March 29, 1971, the United States moved to dismiss the counterclaim and to deny the demand for jury trial. The Supreme Court's order of June 28, 1971 allowed the State of Florida 60 days to respond to that motion. The State of Florida filed its response on August 27, 1971 and the issues raised by the motion and response were thereupon referred to the undersigned as special master.

On September 14, 1971 a prehearing conference with counsel was held at which the parties presented to the special master a joint prehearing statement, which stipulates certain facts and states the respective contentions of the parties. That prehearing statement is attached hereto

and is adopted as a part of this order. The prehearing statement may be amended at any time by agreement of the parties, or by order of the special master on application of either party.

In the light of the contentions of the parties as set out in their joint prehearing statement, the following questions, inter alia, appear to be presented to the special master for decision:

1. Did the Act of June 25, 1868 grant and convey to the State of Florida the right to all the natural resources of the seabed within the boundary described in the Florida Constitution of 1868?

2. Did the Submerged Lands Act grant and convey to the State of Florida the right to all the natural resources of the seabed within the boundary described in the Florida Constitution of 1868?

3. What effect, if any, did the boundary provisions in Florida's 1962 constitutional amendment and 1968 constitutional revision have upon whatever rights the State may have obtained in the seabed adjacent to its coast by virtue of its 1868 Constitution?

4. What is the geographical location of the boundary described in the Florida Constitution of 1868?

5. What is the present coastline between the Northern Jetty at Miami Harbor and Cape Romano, insofar as it affects the location of lines three geographical miles or nine geographical miles seaward therefrom?

6. Is Florida Bay an historic bay?

7. Is Florida Bay a juridical bay?

8. What waters within three leagues of the coast of Florida are in the Gulf of Mexico?

9. What is the seaward limit of the area of the Gulf of Mexico and the Atlantic Ocean in which the State of Florida is entitled to develop the natural resources of the seabed, seaward of which such rights, as against the State of Florida, belong exclusively to the United States?

II. PROCEDURE

To govern the conduct of further proceedings herein, It Is Ordered:

Testimony of Witnesses

1. The testimony in chief of witnesses, including their statements of their training, experience and qualifications, shall be reduced to writing, preferably in question and answer form, and copies thereof shall be furnished to the special master and to counsel for the other party not less than four weeks before the beginning of the hearing at which the witness is to be called upon to testify. The opposing party shall have the right to defer cross-examination for a reasonable period of time, to be determined in each instance by the special master, in order to afford such party an opportunity to study the testimony of the witness and to prepare for cross-examination, except where such an opportunity is manifestly not required. Not later than one week before commencement of the hearing at which the testimony is to be given, the opposing party shall notify the proponent and the special master whether it expects to cross-examine the witness at the conclusion of his direct testimony or to defer part or all of its cross-examination until a later hearing.

Exhibits; Documents; Distribution

2. Copies of exhibits proposed to be offered in evidence shall be furnished to opposing counsel at least four weeks prior to commencement of the hearing at which the exhibits are to be offered in evidence. An exhibit comprising a handwritten document shall be accompanied by a typewritten or printed copy and an exhibit comprising a document written in a language other than English shall be accompanied by an English translation, certified by the custodian or translator, if practicable. In the case of ex-

hibits comprising documents from public sources, copies need not be furnished if they are readily available to the public and an accurate description of the document and of the place where copies may be procured are furnished to counsel for the other party at least four weeks in advance of the hearing at which the exhibits are to be offered in evidence. The party offering an exhibit shall furnish one copy to the special master in addition to the original exhibit.

3. The State of Florida will send 25 copies of all printed pleadings, motions, memorandums and briefs and one copy of all typewritten motions, memorandums, briefs and correspondence to the Solicitor General of the United States as well as one copy of such typewritten motions, memorandums, briefs and correspondence to Bruce C. Rashkow, Esq., Marine Resources Section, Land and Natural Resources Division, United States Department of Justice.

4. The United States will send 5 copies of all printed pleadings, motions, memorandums and briefs and two copies of all typewritten motions, memorandums, briefs and correspondence to the Attorney General of the State of Florida for the attention of W. Robert Olive, Esq.

5. All copies of exhibits or of documents shall be of the same kind and quality as the corresponding exhibit or document in evidence.

Designation of Exhibits

6. Exhibits shall be numbered by the parties for identification prior to being furnished to opposing counsel and offered in evidence, and shall be designated by the same numbers when placed in evidence. Plaintiff's exhibits shall be designated and numbered, consecutively, thus: "United States Exhibit No. 1", etc., and defendant's exhibits: "Florida Exhibit No. 1", etc.

Authentication of Exhibits

7. Copies of documents may be introduced for submission into evidence in lieu of originals. The authenticity of a document and accuracy of a copy need not be proved if copies of the document have been submitted to opposing counsel and the proponent is not requested within two weeks after such submission to prove the authenticity of the document or the accuracy of the copy, or both. Either party may, however, controvert by evidence the authenticity of a document or accuracy of a copy at any time.

Judicial Notice

8. A party intending to ask the special master to take judicial notice of a document or other fact at any hearing shall notify opposing counsel of such intention at least four weeks prior to commencement of the hearing at which the request is to be made. If judicial notice of a document is involved, the notification to the other party shall be accompanied by a copy of the document if practicable.

9. All documents that are subject to judicial notice, copies of which are furnished to the special master and opposing counsel for their convenience, shall be designated in the same manner as documents which the parties offer as evidence. The designation as exhibits of documents that are subject to judicial notice will in no way enhance their probative effect.

10. If any material is submitted to the special master by either of the parties, copies thereof shall be made available by such party to the other party at or before the time of such submission.

Objections to Evidence

11. The special master shall ordinarily rule upon objections to evidence or exhibits at the time the objections are made with leave to the objecting party, in case the objection is overruled, and if so advised, to make a motion

to strike the testimony or exhibit after the examination and cross-examination with respect thereto have been completed.

Requests for Findings of Fact and Conclusions of Law
[as amended November 8, 1973]

12. At times hereafter to be fixed by the special master following the close of the hearings, the parties shall submit to the special master their requests for findings of fact and conclusions of law.

Court Reporter; Transcript of Hearings

13. The parties have agreed to employ a competent court reporter to report the special master's hearings. The parties will make their own arrangements with the reporter for the number of copies of the transcript, daily or otherwise, that they desire for their own use. In addition, the parties will arrange with the reporter to provide the original and one copy of the transcript for the use of the special master and for ultimate filing in the Supreme Court. The parties shall arrange for such corrections to the transcript as they may agree to or as may be directed by the special master.

Record

14. The record in this case includes the following materials in the files of the Supreme Court in Nos. 9 and 35, Original.

(a) Items from the files in No. 9 Original:

(i) Amended Complaint and Statement with Respect to Amended Complaint;

(ii) Defenses [of Florida] to Amended Complaint;

(iii) Opinion of the Court, United States v. Louisiana, et al., filed May 31, 1960, 363 U.S. 1;

(iv) Opinion of the Court, United States v. Florida, filed May 23, 1960, 363 U.S. 121;

(v) Decree, United States v. Louisiana, et al., entered December 12, 1960, 364 U.S. 502;

(vi) Joint Motion of the United States and the State of Florida to Initiate Supplemental Proceedings; To Consolidate Proceedings; To Appoint a Special Master; and For Entry of a Supplemental Decree; and Memorandum in Support of Motion;

(b) Items from the files in No. 35, Original:

(i) Motion for Leave to File Complaint, Complaint, and Brief in Support of Motion;

(ii) Motion of the United States for Judgment, and Brief in Support of Motion;

(iii) Motion for Severance of the State of Florida and for the Appointment of a Special Master, and Brief in Support of Motion;

(iv) Amended Answer of the State of Florida;

(v) Joint Motion of the United States and the State of Florida to Consolidate Proceedings Herein Against the State of Florida with United States v. State of Louisiana, et al., No. 9, Original, and Memorandum in Support of Motion;

(vi) Motion by the United States to Dismiss the Counterclaim and Deny the Demand for Jury Trial Filed by the State of Florida and Memorandum in Support of Motion;

(vii) Report of the Special Master Upon Motion of the State of Florida for Severance;

(c) Such other materials in the files in Nos. 9 and 35, Original, as may be designated hereafter by either party or by the special master.

ALBERT B. MARIS

September 22, 1971 *Special Master*

JOINT PREHEARING STATEMENT

The United States and the State of Florida jointly submit the following prehearing statement.

I. PREAMBLE

The purpose of this proceeding is to determine the seaward limit of the area of the Gulf of Mexico and the Atlantic Ocean in which the State of Florida is entitled as against the United States to develop the natural resources of the seabed insofar as it has not heretofore been determined by the Supreme Court.

II. STIPULATION

A. The United States recognizing that its motion for judgment on the pleadings in No. 35, Original is inapplicable in these severed and consolidated proceedings withdraws that motion from consideration in this case.

B. Noting that the location of the coastline of the State of Florida is material to the determination of the respective rights of the parties in the Gulf of Mexico and the Atlantic Ocean, the parties stipulate that, except as otherwise put in issue by the contentions of the parties herein stated, the coastline of Florida is:

1. The line of mean low-water along the coast as marked on the largest scale charts developed or to be developed by the National Ocean Survey or its predecessor the United States Coast and Geodetic Survey:

2. The following lines marking the outer limits of inland waters:

(a) At St. Marys River, a line between the outer limits of the jetties;

(b) At St. Johns River, a line between the outer limits of the jetties;

3. At Biscayne Bay:

(a) A line between Fisher Island and Virginia Key;

(b) A line between Virginia Key and Key Biscayne;

(c) A line between Cape Florida and Ragged Key;

(d) A line between Ragged Key and Boca Chita Key;

(e) A line between Boca Chita Key and Sands Key;

(f) A line across the mouth of Ceasar Creek;

(g) A line across the mouth of Broad Creek.

The approximate locations of the lines described in paragraph 2 are illustrated on Exhibit A attached hereto; but it is understood that the exact location of those lines may be determined with greater precision hereafter, and that the location of those lines may be modified by future changes in the shoreline.

The determination of the coastline not otherwise provided herein shall be governed by pertinent articles of the Convention on the Territorial Sea and the Contiguous Zones adopted by the United Nations Conference at Geneva, 1958 and ratified by the United States on March 24, 1961, 15 U.S.T. (Pt. 2) 1606.

III. CONTENTIONS

The parties make the following contentions:

A. *The United States contends —*

1. That the State of Florida has no rights in the natural resources of the seabed seaward of the coastline, except as granted by the Submerged Lands Act.

2. That the Submerged Lands Act granted to Florida the rights to the natural resources of the seabed only as follows:

(a) In the Atlantic Ocean, within three geographical miles of the coastline as defined in the Submerged Lands Act;

(b) In the Gulf of Mexico, within the boundary of Florida as that boundary was described in the Florida Constitution of 1868 and was located on June 25, 1868, but in no event less than three geographical miles nor more than three marine leagues (nine geographical miles) seaward from the coastline as defined in the Submerged Lands Act, as that coastline exists at any given time.

3. That the Gulf of Mexico is divided from the Atlantic Ocean by a line running due north along the meridian of longitude 83° W., from the coast of Cuba to latitude 24° 35′ N.; thence due east along the parallel of latitude 24° 35′ N. to Rebecca Shoal, at longitude 82° 35′ W.; thence through the shoals and Florida Keys to the mainland at the eastern end of Florida Bay, all the narrow waters between the Dry Tortugas and the mainland being considered to be within the Gulf.

4. That the boundary described in the Florida Constitution of 1868 should be construed, according to the facts as they existed in 1868, in a manner to be described by the United States after completing consultations with its experts.

5. That the body of water designated as Florida Bay is neither a juridical bay nor an historic bay.

6. That no system of straight baselines can be given effect unless the coastal nation has expressly adopted such a system and that the United States has never adopted such a system for the coast of Florida or any other part of the coast.

7. That if, contrary to the first contention of the United States, the State of Florida, independently of the Submerged Lands Act, had rights in the natural resources

of the seabed seaward of the coastline within the boundary described in its 1868 Constitution, then the State of Florida has relinquished those rights to the extent that areas included in the boundary described in the 1868 Constitution lie seaward of the boundary described in the 1885 Constitution, as amended November 6, 1962.

8. That, as against the State of Florida, the United States has the exclusive right to explore the continental shelf and exploit its natural resources in the area to be described by the United States after completing consultations with its experts.

B. *The State of Florida contends* —

1. That by virtue of the Act of June 25, 1868, Congress expressly or impliedly conveyed and granted to the State of Florida the rights and interests in title possessed by the United States in the area encompassed by the boundary described in the Florida Constitution of 1868, which rights include ownership of the submerged lands and resources.

2. That the boundary described in the Florida Constitution of 1868 should be construed as follows:

> * * * ; thence in a straight line to the head of the St. Marys River; thence down the middle of said river to the Atlantic Ocean; thence due east to the edge of the Gulf Stream or a distance of three geographic miles whichever is the greater distance; thence in a southerly direction along the edge of the Gulf Stream or along a line three geographic miles from the Atlantic coastline and three leagues distant from the Gulf of Mexico coastline, whichever is greater, to and through the Straits of Florida and westerly, including the Florida reefs, to a point due south of and three leagues from the southernmost point of the Marquesas Keys; thence westerly along a straight line to a point due

south of and three leagues from Loggerhead Key, the westernmost of the Dry Tortugas Islands; thence westerly, northerly and easterly along the arc of a curve three leagues distant from Loggerhead Key to a point due north of Loggerhead Key; thence northeast along a straight line to a point three leagues from the coastline of Florida; thence northerly and westerly three leagues distant from the coastline to a point west of the mouth of the Perdido River three leagues from the coastline as measured from a line bearing south 0° 01′ 00″ west from the point of beginning; thence northerly along said line to the point of beginning. The State of Florida shall also include any additional territory within the United States adjacent to the Peninsula of Florida lying south of the St. Marys River, east of the Perdido River, and south of the States of Alabama and Georgia.

3. That Florida's claim to the natural resources of the seabed seaward of the line of mean low water under the Submerged Lands Act is identical to that described in paragraph 1 above.

4. That, even if the Court finds that the State of Florida, by its 1962 amendment to its 1885 Constitution, relinquished rights it acquired to the natural resources of the seabed adjacent to its coasts, which the State denies, then the State by its 1968 Revised Constitution reacquired those rights.

5. That the present coastline of the State of Florida between the seaward end of the Northern Jetty of Miami Harbor, Miami, Florida, also known as Government Cut, and Cape Romano is determined by the application of a system of straight baselines as defined in the Convention on the Territorial Sea and the Contiguous Zone as follows:

Beginning at the seaward end of the Northern Jetty of Miami Harbor, Miami, Florida, also known as

Government Cut, said point being the Point of beginning of a base line; thence running on a direct line southeasterly to Fowey Rocks, thence in a southwesterly direction through Brewster Reef, Ledbury Reef, Star Reef, Triumph Reef, Long Reef, Ajax Reef, Pacific Reef, Turtle Reef, Carysfort Reef, The Ecbow, French Reef, Molasses Reef, Pickles Reef, Conch Reef, Little Conch Reef, Davis Reef, Crocker Reef, Alligator Reef, to the Tennessee Reef Light better described on Coast and Geodetic Survey Chart No. 1250 as FL. 4 Sec. 49 ft. 12M, thence continue in a southwesterly direction through Sombrero Key, Looe Key, American Shoal, Maryland Shoal, Pelican Shoal, Eastern Sambo, Western Sambo, Eastern Dry Rocks, and Sand Key to the Western Dry Rock, thence in a northwesterly direction through Vestal Shoal, Coalbin Rock, to Cosgrove Shoal; thence in a direct line to an unnamed rock, lying 231° from the Lighthouse at Loggerhead Key at a distance of 4,224 feet more or less, thence in a northeasterly direction to Texas Rock, thence in a direct line northeasterly to the southernmost point of Cape Romano, said point being the ending of aforesaid base line for the State of Florida.

6. That the coastline of the State of Florida in 1868 between the location of the Northern Jetty of Miami Harbor, Miami, Florida, and Cape Romano is to be determined on the basis of a system of straight baselines similar to that described in the above paragraph according to the facts as they existed in 1868.

7. That Florida Bay is an historic or juridical bay and thus inland waters of the State of Florida.

8. That Florida Bay is within Florida's historic boundary as described in Florida's Constitution of 1868.

9. That the waters of the Gulf of Mexico extend seaward in excess of three leagues from the line described in

paragraph 5, *supra*, south of the latitude of the point of beginning of that line.

Respectfully submitted.

ERWIN N. GRISWOLD
Solicitor General of the United States

ROBERT L. SHEVIN
Attorney General of Florida

by: HERBERT T. SCHWARTZ
Deputy Attorney General

September 1971

[Exhibit A, which was attached to the foregoing joint prehearing statement, consisting of Coast and Geodetic Survey Charts C. & G. S. 1242, 1243, 1248 and 1249. They are reproduced later in this appendix.]

SUBMERGED LANDS ACT OF 1953
Public Law 31, CHAPTER 65

AN ACT

To confirm and establish the titles of the States to lands beneath navigable waters within State boundaries and to the natural resources within such lands and waters, to provide for the use and control of said lands and resources, and to confirm the jurisdiction and control of the United States over the natural resources of the seabed of the Continental Shelf seaward of State boundaries.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Submerged Lands Act".

TITLE I

DEFINITION

SEC. 2. When used in this Act—

(a) The term "lands beneath navigable waters" means—

(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and

(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;

(b) The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 4 hereof but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico;

(c) The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;

(d) The terms "grantees" and "lessees" include (without limiting the generality thereof) all political subdivisions, municipalities, public and private corporations, and other persons holding grants or leases from a State, or from its predecessor sovereign if legally validated, to lands beneath navigable waters if such grants or leases were issued in accordance with the constitution, statutes, and decisions of the courts of the State in which such lands are situated, or of its predecessor sovereign: *Provided, however*, That nothing herein shall be construed as conferring upon said grantees or lessees any greater rights or interests other than are described herein and in their respective grants from the State, or its predecessor sovereign;

(e) The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power;

(f) The term "lands beneath navigable waters" does not include the beds of streams in lands now or heretofore constituting a part of the public lands of the United States if such streams were not meandered in connection with the public survey of such lands under the laws of the United States and

if the title to the beds of such streams was lawfully patented or conveyed by the United States or any State to any person;

(g) The term "State" means any State of the Union;

(h) The term "person" includes, in addition to a natural person, an association, a State, a political subdivision of a State, or a private, public, or municipal corporation.

TITLE II

LANDS BENEATH NAVIGABLE WATERS WITHIN STATE BOUNDARIES

SEC. 3. RIGHTS OF THE STATES.—

(a) It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

(b) (1) The United States hereby releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources; (2) the United States hereby releases and relinquishes all claims of the United States, if any it has, for money or damages arising out of any operations of said States or persons pursuant to State authority upon or within said lands and navigable waters; and (3) the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States shall pay to the respective States or their grantees issuing leases covering such lands or natural re-

sources all moneys paid thereunder to the Secretary of the Interior or to the Secretary of the Navy or to the Treasurer of the United States and subject to the control of any of them or to the control of the United States on the effective date of this Act, except that portion of such moneys which (1) is required to be returned to a lessee; or (2) is deductible as provided by stipulation or agreement between the United States and any of said States;

(c) The rights, powers, and titles hereby recognized, confirmed, established, and vested in and assigned to the respective States and their grantees are subject to each lease executed by a State, or its grantee, which was in force and effect on June 5, 1950, in accordance with its terms and provisions and the laws of the State issuing, or whose grantee issued, such lease, and such rights, powers, and titles are further subject to the rights herein now granted to any person holding any such lease to continue to maintain the lease, and to conduct operations thereunder, in accordance with its provisions, for the full term thereof, and any extensions, renewals, or replacements authorized therein, or heretofore authorized by the laws of the State issuing, or whose grantee issued such lease: *Provided, however,* That, if oil or gas was not being produced from such lease on and before December 11, 1950, or if the primary term of such lease has expired since December 11, 1950, then for a term from the effective date hereof equal to the term remaining unexpired on December 11, 1950, under the provisions of such lease or any extensions, renewals, or replacements authorized therein, or heretofore authorized by the laws of the State issuing, or whose grantee issued, such lease: *Provided, however,* That within ninety days from the effective date hereof (i) the lessee shall pay to the State or its grantee issuing such lease all rents, royalties, and other sums payable between June 5, 1950, and the effective date hereof, under such lease and the laws of the State issuing or whose grantee issued such lease, except such rents, royalties, and other sums as have been paid to the State, its grantee, the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States and not

refunded to the lessee; and (ii) the lessee shall file with the Secretary of the Interior or the Secretary of the Navy and with the State issuing or whose grantee issued such lease, instruments consenting to the payment by the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States to the State or its grantee issuing the lease, of all rents, royalties, and other payments under the control of the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States or the United States which have been paid, under the lease, except such rentals, royalties, and other payments as have also been paid by the lessee to the State or its grantee;

(d) Nothing in this Act shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power;

(e) Nothing in this Act shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian, relating to the ownership and control of ground and surface waters; and the control, appropriation, use, and distribution of such waters shall continue to be in accordance with the laws of such States.

SEC. 4. SEAWARD BOUNDARIES.—The seaward boundary of each original coastal State is hereby approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or here-

after asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is hereby approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress.

SEC. 5. EXCEPTIONS FROM OPERATION OF SECTION 3 OF THIS ACT.—There is excepted from the operation of section 3 of this Act—

(a) all tracts or parcels of land together with all accretions thereto, resources therein, or improvements thereon, title to which has been lawfully and expressly acquired by the United States from any State or from any person in whom title had vested under the law of the State or of the United States, and all lands which the United States lawfully holds under the law of the State; all lands expressly retained by or ceded to the United States when the State entered the Union (otherwise than by a general retention or cession of lands underlying the marginal sea); all lands acquired by the United States by eminent domain proceedings, purchase, cession, gift, or otherwise in a proprietary capacity; all lands filled in, built up, or otherwise reclaimed by the United States for its own use; and any rights the United States has in lands presently and actually occupied by the United States under claim of right;

(b) such lands beneath navigable waters held, or any interest in which is held by the United States for the benefit of any tribe, band, or group of Indians or for individual Indians; and

(c) all structures and improvements constructed by the United States in the exercise of its navigational servitude.

SEC. 6 POWERS RETAINED BY THE UNITED STATES.—(a) The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 3 of this Act.

(b) In time of war or when necessary for national defense, and the Congress or the President shall so prescribe, the United States shall have the right of first refusal to purchase at the prevailing market price, all or any portion of the said natural resources, or to acquire and use any portion of said lands by proceeding in accordance with due process of law and paying just compensation therefor.

SEC. 7. Nothing in this Act shall be deemed to amend, modify, or repeal the Acts of July 26, 1866 (14 Stat. 251), July 9, 1870 (16 Stat. 217), March 3, 1877 (19 Stat. 377), June 17, 1902 (32 Stat. 388), and December 22, 1944 (58 Stat. 887), and Acts amendatory thereof or supplementary thereto.

SEC. 8. Nothing contained in this Act shall affect such rights, if any, as may have been acquired under any law of the United States by any person in lands subject to this Act and such rights, if any, shall be governed by the law in effect at the time they may have been acquired: *Provided, however,* That nothing contained in this Act is intended or shall be construed as a finding, interpretation, or construction by the Congress that the law under which such rights may be claimed in fact or in law applies to the lands subject to this Act, or authorizes or compels the granting of such rights in such lands, and that the determination of the applicability or effect

of such law shall be unaffected by anything contained in this Act.

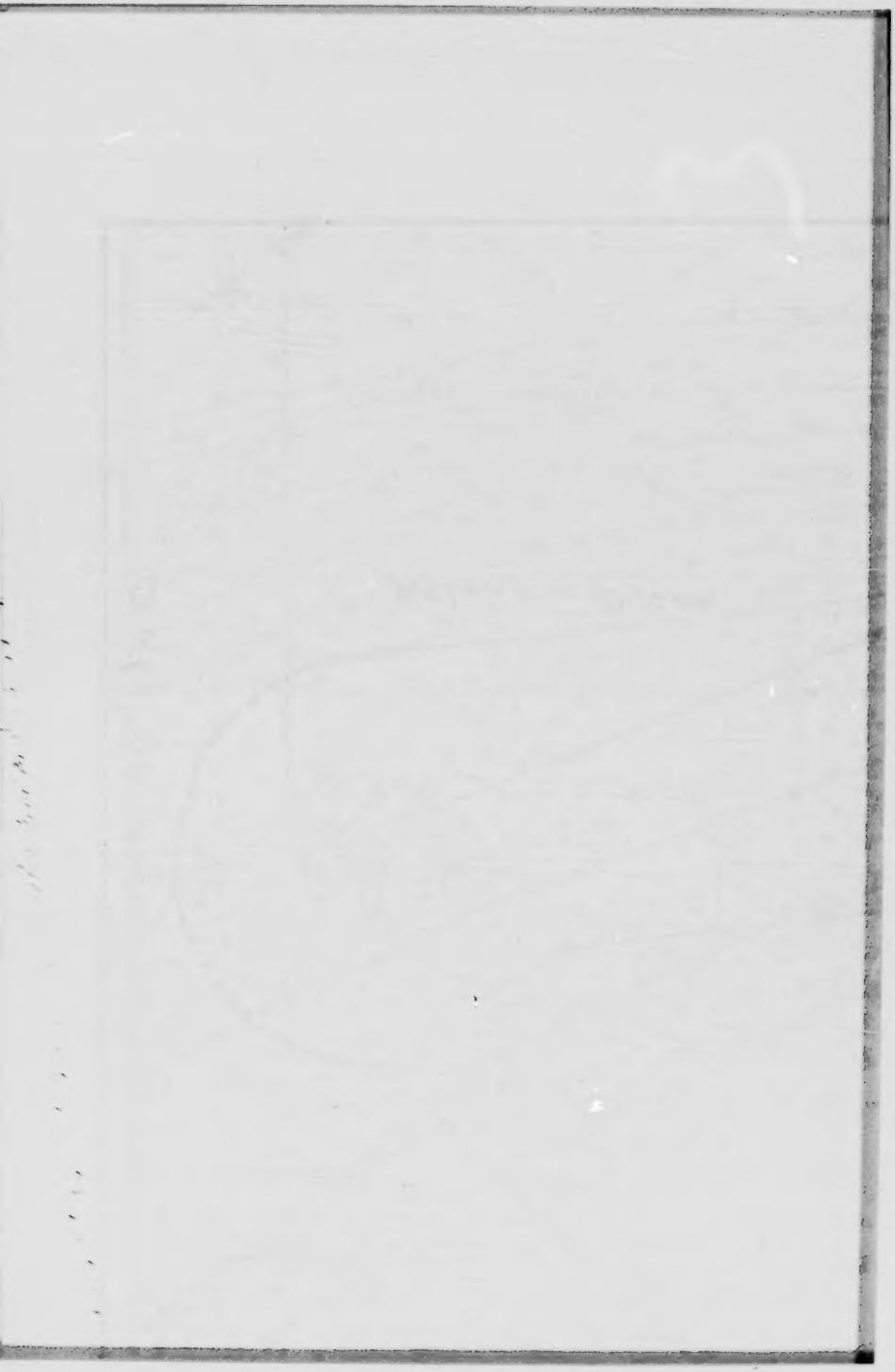
SEC. 9. Nothing in this Act shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and seabed of the Continental Shelf lying seaward and outside of the area of lands beneath navigable waters, as defined in section 2 hereof, all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is hereby confirmed.

SEC. 10. Executive Order Numbered 10426, dated January 16, 1953, entitled "Setting Aside Submerged Lands of the Continental Shelf as a Naval Petroleum Reserve", is hereby revoked insofar as it applies to any lands beneath navigable waters as defined in section 2 hereof.

SEC. 11. SEPARABILITY.--If any provision of this Act, or any section, subsection, sentence, clause, phrase or individual word, or the application thereof to any person or circumstance is held invalid, the validity of the remainder of the Act and of the application of any such provision, section, subsection, sentence, clause, phrase or individual word to other persons and circumstances shall not be affected thereby; without limiting the generality of the foregoing, if subsection 3 (a) 1, 3 (a) 2, 3 (b) 1, 3 (b) 2, 3 (b) 3, or 3 (c) or any provision of any of those subsections is held invalid, such subsection or provision shall be held separable and the remaining subsections and provisions shall not be affected thereby.

Approved May 22, 1953.

Section of C. & G. S. 1113 ⟶



OUTS ARE TOO LARGE TO BE FILMED

IN THE

Supreme Court of the United States

FILED
DEC 20 1971
E. ROBERT SEAVER, CLERK

October Term, 1971 No. 52, Original

UNITED STATES OF AMERICA,
Plaintiff

v.

STATE OF FLORIDA,
Defendant

REPORT OF THE SPECIAL MASTER UPON THE MOTION BY THE UNITED STATES TO DISMISS THE COUNTERCLAIM AND DENY THE DEMAND FOR JURY TRIAL FILED BY THE STATE OF FLORIDA

November 30, 1971

ALBERT B. MARIS
Special Master

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107

IN THE

Supreme Court of the United States

October Term, 1971 — No. 52, Original

UNITED STATES OF AMERICA,
Plaintiff

v.

STATE OF FLORIDA,
Defendant

REPORT OF THE SPECIAL MASTER UPON THE MOTION BY THE UNITED STATES TO DISMISS THE COUNTERCLAIM AND DENY THE DEMAND FOR JURY TRIAL FILED BY THE STATE OF FLORIDA

TO THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Pursuant to the order of the Court entered June 28, 1971, 403 U.S. 949, your special master submits the following report with respect to the motion filed by the United States to dismiss the counterclaim and deny the demand for a jury trial filed by the State of Florida, which motion was referred to me by that order.

The complaint, which was filed by the United States in No. 35, Original, against the States of Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia and Florida alleged that the United States is entitled, to the exclusion of the defendant States, to exercise sovereign rights over the seabed and subsoil underlying the Atlantic Ocean, including the Straits of Florida, lying more than three geographical miles from the ordinary low water mark or from the outer limit of inland waters on the coast (within which coastal area the United States had transferred its rights to the States by the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. §§1301 et seq.) seaward to the limits of the Continental Shelf for the purpose of exploring the area and exploiting its natural resources. The complaint asserted that the defendant States, including the State of Florida, claim rights in the seabed and subsoil of the Continental Shelf beyond the outer limits of the areas granted them by the Submerged Lands Act. A separate cause of action was asserted against each defendant State and a declaratory decree and order for accounting were sought.

The State of Florida filed an answer and on February 4, 1971 an amended answer. The latter contains a counterclaim for damages and a demand for a jury trial on the counterclaim. By its amended answer Florida denies the claim of the United States to rights in the seabed and subsoil of the Continental Shelf and sets up two affirmative defenses, one to a portion of the claim of the United States and the other to the whole of it. The first is that the Straits of Florida are an arm of the Gulf of Mexico, that the Florida Keys are in the Gulf of Mexico, and that Florida is entitled to a southern seaward boundary of three marine leagues from its coastline wherever located in this area. Florida's other and principal affirmative defense is that by the Act of June 25, 1868, 15 Stat. 73, Congress approved the marine boundaries of the State and granted to Florida whatever interest the United States possessed in the maritime terri-

tory within those boundaries, which boundaries, Florida asserts, run more than three geographical miles seaward from its coast in part of the Atlantic Ocean.

By the counterclaim which it included in its amended answer, Florida repeats its averments that Congress by the Act of 1868 granted to the State the submerged lands within the marine boundaries specified in its constitution and thereby vested title to at least 509,224 acres of submerged lands in the Atlantic Ocean. The counterclaim then asserts that "By now denying said title of the State of Florida, the United States of America is seeking to take said property without just compensation" and it asks for damages from the United States in excess of $51,000,000 and demands a trial by jury on the claim.

Thereafter, the United States filed a motion to dismiss the counterclaim on the ground that it represents a suit against the United States to which it has not consented and that, in any event, it fails to state a claim for which relief can be granted. The motion also seeks denial of the demand for jury trial on the ground that Florida is not a "citizen" and its counterclaim is not an "action at law" within the meaning of 28 U.S.C. §1872. In its memorandum filed in opposition to the motion to dismiss the counterclaim, Florida seeks to broaden the basis for its counterclaim by asserting that the United States "seemingly contends that the Submerged Lands Act limits" to three geographic miles the larger area of seabed in the Atlantic Ocean which allegedly had been granted to it by the Act of 1868, and that the subsequent enactment of the Submerged Lands Act, therefore, constituted a taking of its property for which it is entitled to just compensation.

On joint motion of the United States and the State of Florida and upon the report of your special master the Court by the orders of June 28, 1971, 403 U.S. 949, 950, severed the cause of action asserted by the United States against the State of Florida from its causes of action against the other twelve Atlantic seaboard States in No. 35, Original, for all purposes and consolidated that cause of action

with the remaining proceedings with respect to the State of Florida in the case of United States v. Louisiana, Texas, Mississippi, Alabama and Florida, No. 9, Original, the severed and consolidated case to be known as United States of America v. State of Florida, No. 52, Original.

The motion of the United States came on for hearing before me on October 22, 1971. In a reply memorandum filed for the United States, the Solicitor General asserts that "we have never contended that the Submerged Lands Act took anything away from any State. The Act was a grant, not a taking. If, contrary to our belief, Florida had seabed rights beyond three miles before the Act, the Act did not diminish them, and they presumably will be recognized by the judgment in this case." At the hearing counsel for the United States stated that the United States adhered to that view and would, in this case, continue to adhere to it. In view of the position of the United States as thus stated, counsel for the State of Florida conceded that the counterclaim filed by that State was without legal basis and that it might, therefore, be dismissed. Counsel also stated that Florida did not desire to press its demand for a jury trial, which demand falls, in any event, with the dismissal of the counterclaim to which it was directed.

Your special master accordingly recommends that an order be entered dismissing the counterclaim of the State of Florida filed February 4, 1971 and denying the demand of the State of Florida for a trial thereof by jury.

Respectfully submitted,

ALBERT B. MARIS
Special Master

November 30, 1971

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 52, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF FLORIDA

EXCEPTIONS OF THE UNITED STATES TO THE REPORT OF THE SPECIAL MASTER FILED FEBRUARY 19, 1974, AND BRIEF IN SUPPORT OF EXCEPTIONS

EXCEPTIONS

The United States takes exception to two determinations by the Special Master that certain waters previously treated by the United States in the conduct of its foreign affairs as territorial seas or international waters are instead inland waters within the coastline of the State of Florida:

1. The United States excepts to the Special Master's conclusion (Report, p. 57) that "[t]he waters between the mainland and the upper Florida Keys which lie east of a straight line drawn between the East Cape of Cape Sable and Knight Key * * * constitute inland waters of the State of Florida," and to the findings on which that conclusion is based.

2. The United States further excepts to the Special Master's finding (Report, pp. 52–53) that the narrow waters within each of three groups of islands—the lower Florida Keys from Money Key to Key West, the Marquesas Keys, and the Dry Tortugas Islands—are inland waters of the State of Florida.

STATEMENT

This case involves the rights of the State of Florida in the sea and seabed adjacent to its coasts. It is a continuation of the tidelands litigation falling within the original jurisdiction of this Court; a brief review of that litigation may therefore be helpful.

In *United States* v. *California,* 332 U.S. 19 (*California I*), this Court held that the United States, and not the several States, has full dominion over the resources of the seabed of the territorial sea. This principle was reaffirmed by the Court in *United States* v. *Louisiana,* 339 U.S. 699 (*Louisiana I*), and *United States* v. *Texas,* 339 U.S. 707.

Shortly thereafter, Congress enacted the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301 *et seq.*, granting all coastal States ownership of the resources of the seabed within three geographical miles of their coasts, and further granting the coastal States along the Gulf of Mexico such ownership within their historic offshore boundaries, if any, out to a maximum of three marine leagues in the Gulf. It was then determined, in *United States* v. *Louisiana,* 363 U.S. 1 (*Louisiana II*), and *United States* v. *Florida,* 363 U.S. 121, that Texas and Florida, but not the other Gulf coastal States, possessed historic offshore boundaries extending more

than three geographical miles into the Gulf. The cause (No. 10, Original, subsequently renumbered as No. 9, Original) was retained "to determine the coastline, fix the boundary and dispose of all other relevant matters." *United States* v. *Florida, supra,* 363 U.S. at 129. The particular issues remaining between Florida and the United States were the location of the line dividing the Atlantic Ocean from the Gulf of Mexico, the determination of Florida's coastline, and the fixing of its historic boundary in the Gulf.

Subsequently, the United States instituted a new proceeding (No. 35, Original) against all thirteen Atlantic coast States, including Florida, to determine the respective rights of the United States and those States to the resources of the seabed adjacent to them in the Atlantic Ocean. Florida's claims in that proceeding were different from those of the other Atlantic coast States, and it moved that the case against it be severed.

At this point, the United States and Florida jointly moved for consolidation of the issues between them, involving both the Gulf of Mexico and the Atlantic Ocean, into a single, separate proceeding. This Court granted the joint motions, ordered Florida severed from the other States in No. 9, Original and No. 35, Original, consolidated the Florida proceedings into this action (No. 52, Original), and appointed a Special Master. 403 U.S. 949, 950.

Several interrelated issues were before the Special Master:

(1) Florida's principal contention was that congressional approval of its 1868 constitution constituted an express or implied grant of all natural resources of the seabed within its historic offshore boundary in both the Atlantic Ocean and the Gulf of Mexico, and that the State is therefore entitled to those resources without regard to the three-mile and three-league limits of the Submerged Lands Act. The Special Master rejected that contention and determined (Report, pp. 8–11, 56) that the State is entitled only to the rights specifically granted by the Act.

(2) The parties disagreed as to the location of the line dividing the Atlantic Ocean from the Gulf of Mexico, and the Special Master determined (Report, pp. 18–21, 56) the location of that line in the manner contended for by the United States.

(3) The parties disagreed as to the location of that segment of the State's historic boundary in the Gulf of Mexico running northeastwardly from the Dry Tortugas Islands toward the mainland. Florida contended that the boundary was marked by a straight line running due northeast from the Dry Tortugas, encompassing "a very large roughly semicircular area of comparatively deep water" (Report, p. 26); the United States contended that the boundary followed along connected segments of straight lines, five-fathom curves, and three-fathom curves, running generally northeastwardly in shallow waters within three marine leagues of the coastline of the outlying islands. The respective contentions are set forth on the chart op-

posite page 84 of the Report. The Special Master rejected both contentions and fixed (Report, pp. 24–31) the historic boundary as running along a line three marine leagues seaward of the coastline.

(4) Florida contended that the waters generally circumscribed by the mainland, the islands running out from the mainland all the way to the Dry Tortugas, and a line running due northeast from the Dry Tortugas back to the mainland, constituted an historic bay which comprised inland waters of the State. The United States contended that none of that area of water satisfied the requirements of an historic bay. The Special Master rejected Florida's broad contention but nevertheless determined (Report, pp. 36–47, 57) that the portion of that area lying east of a straight line drawn between Knight Key and East Cape (see the chart opposite page 84 of the Report) constitutes a juridical bay, which he denominated "Florida Bay," and that the waters within that bay are inland waters of the State.

(5) Under the Submerged Lands Act, the coastline of a State is defined as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." 43 U.S.C. 1301(c). The Special Master's determination that the waters of Florida Bay are inland waters required his further determination (Report, pp. 47–55) that the coastline surrounds the Bay by means of closing lines running southwestwardly from the mainland through the

upper Florida Keys to Knight Key, and across the mouth of the Bay from Knight Key to East Cape. The coastline was not otherwise in dispute between the parties, who understood that it would be defined elsewhere by natural shorelines. But the Special Master determined *sua sponte* that as to each of three groups of outlying islands—the lower Florida Keys from Money Key to Key West, the Marquesas Keys, and the Dry Tortugas—"the narrow waters within the group are inland waters of the State of Florida and the coastline follows the ordinary low-water line along those portions of the coast of the outer islands and low-tide elevations of the group which are in direct contact with the open sea and straight lines drawn between those islands and low-tide elevations" (Report, pp. 52–53).

(6) The Special Master concluded (Report, pp. 57–59) that Florida is entitled, as against the United States, to the seabed and all the natural resources of the seabed and the sea within three geographical miles of its coastline in the Atlantic Ocean and three marine leagues of its coastline in the Gulf of Mexico, and that the United States is entitled, as against Florida, to the seabed and all the natural resources of the seabed and sea of the outlying continental shelf.

The United States excepts only to the Special Master's determinations that the Florida Bay and the narrow waters of the three groups of outlying islands constitute inland waters of the State.

ARGUMENT

I

FLORIDA BAY IS NOT A JURIDICAL BAY

1. The determination whether Florida Bay is a juridical bay constituting inland waters of the State of Florida has little importance to the final determination of the respective seabed rights of the United States and the State under the Submerged Lands Act. Measuring the State's historic boundary from the Bay's closing lines as designated by the Special Master, rather than from the natural shorelines of the mainland and upper Florida Keys, affects little more than ten square miles of seabed in an area having no known mineral resources.[1] But the juridical status of the Bay has a larger international significance which is unrelated to the Act.

In the conduct of its foreign affairs, the United States treats the waters of Florida Bay as territorial seas or international waters. The United States presently claims a three-mile territorial sea, measured from the mainland islands, and certain low-tide elevations along the Bay. The extent of that claim is shown on the chart opposite page 94 of the Report.

[1] Moreover, even if the existence of a juridical bay is assumed the Special Master erred in measuring the historic boundary from the present closing line; the historic rather than present closing line should have been used for that purpose; and the historic closing line, if any, was too far east to affect the historic boundary. See pp. 14–15, *infra*.

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Similar maps have in the past been distributed to foreign governments in order to indicate to them the extent of our territorial sea (Report, p. 42). Approval of the Special Master's determination of the existence of a juridical bay would extend the United States' claim into waters previously treated as high seas, and it would imply adoption by the United States of a principle permitting one side of a bay to be formed by a chain of islands. These results would be contrary to the foreign policy of the United States, which has consistently been to discourage coastal states from extending their jurisdiction into areas previously regarded as high seas. See, *e.g.*, 4 Whiteman, *Digest of International Law* 88–91 (1965).

The 24-mile closing line proposed by the Special Master would enclose waters through which foreign vessels have historically possessed the right of innocent passage. The determination that those waters are inland waters, subject to the exclusive dominion of the coastal nation, cuts off that right.[2] Foreign vessels passing through the keys east of Knight Key would henceforth do so only at the sufferance of the coastal State. Although the shallow waters in the Bay are not readily navigable by large ships, smaller vessels would be affected, and a precedent would be set which other nations might use to shut off passage through island chains near their coasts. Also, by extending both the territorial sea and the nine-mile

[2] For an enumeration of the rights possessed within the territorial sea, see Articles 14–23 of the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. (Part 2) 1606.

contiguous zone into areas previously considered high seas, the Special Master's determination would sharply curtail the rights of foreign vessels: foreign vessels, which had previously operated in those seas without any interference by the United States, would become subject to American customs, immigration, pollution, and fisheries laws and, within the extended areas of territorial sea, would be deprived of all high seas rights.

In short, the Special Master's determination threatens many international maritime rights in both the Bay and the outlying waters.

2. The Act grants seabed rights extending "from the coast line" of the coastal State, and, as we have previously indicated, "coast line" is defined as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." 43 U.S.C. 1301(b), (c). This Court, in *United States* v. *California* (*California II*), 381 U.S. 139, further determined that the meaning of "inland waters," as used in the Act, conforms to its meaning in the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. (Part 2) 1606. And the parties here stipulated that the determination of the Florida coastline "shall be governed by pertinent articles of the Convention * * *" (Report, p. 69).

Article 7 of the Convention, which is set forth at pages 37–38 of the Report, describes a juridical bay as a "well-marked indentation" containing "landlocked waters." We believe that the Special Master erred in

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determining that Florida Bay is a juridical bay within the meaning of that Article.[3]

In the *Louisiana Boundary Case*, 394 U.S. 11, this Court distinguished between Article 7 bays, which are formed by indentations in a mainland coast, and bodies of water lying between the mainland and fringes or chains of islands lying off the coast. The Court there expressly sustained the position of the United States that "island chains can be taken into account as enclosing inland waters only by drawing straight baselines [and that] the decision whether to draw such baselines is within the sole discretion of the Federal Government." 394 U.S. at 67. The Court "concluded that Article 7 does not encompass bays formed in part by islands which cannot realistically be considered part of the mainland." *Ibid.* Accordingly, a body of water bounded on one side by the mainland and on the other side by a chain of islands, and not formed by any substantial indentation in the mainland, cannot be a juridical bay under Article 7 unless the islands are "so closely aligned with the mainland as to be deemed a part of it." 394 U.S. at 67, n. 88.

[3] Moreover, even if the Special Master was correct in determining the existence of a juridical bay, he erred in drawing the closing line between Knight Key and the East Cape of Cape Sable. That line has a distance of 24.55 geographic miles and therefore exceeds the maximum closing line of twenty-four miles permitted by Article 7. See *Louisiana Boundary Case*, 394 U.S. 11, 48–50, n. 64. However, if the finding of a juridical bay is sustained, a closing line of proper length could be drawn from East Cape to Vaca Key.

Florida Bay does not meet the tests set forth in the *Louisiana Boundary Case*. The Bay is not formed by any substantial indentation in the mainland; it is simply a body of water lying between the mainland and the upper Florida Keys. And the upper Florida Keys cannot realistically be considered part of the mainland. There are substantial water barriers between several of the keys: gaps of approximately one mile or more separate Teatable Key from Indian Key, Lower Matecumbe Key from Greyhound Key, and Long Key from the Conch Keys. See the chart opposite page 94 of the Report. Moreover, there are at least two navigation channels—between Teatable and Indian Keys, and Lower Matecumbe and Greyhound Keys—through the upper Florida Keys. *Ibid.;* and see the the chart opposite page 84 of the Report. It is the view of the United States that the channels and water gaps west of Teatable Key preclude any finding that the keys further west are "so closely aligned with the mainland as to be deemed a part of it." Certainly there is no basis for such a finding with respect to the outermost of the upper Keys, Knight Key, which is separated from the mainland by several water gaps and channels.

The Special Master did, however, make a general finding to that effect. His reasoning is not set forth in detail in his Report, but he apparently relied (Report, p. 39) on an earlier portion of the *Louisiana Boundary Case* opinion (394 U.S. at 60-66) which dealt with the circumstances in which islands may be treated as headlands of bays. That discussion, how-

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ever, concerned only bays which are formed by substantial indentations into the mainland coast but additionally have a "natural entrance point" or headland located on an island.[4] That discussion, of course, does not apply to cases, such as this, where there is no substantial indentation in the mainland coast. The question here is not whether the headland of a bay may be located on an island, but rather whether a juridical bay may be formed by a fringe of islands projecting out from a generally flat or convex mainland. The answer given to that legal question by this Court in the past—that a juridical bay may be so formed only when the islands may realistically be deemed part of the mainland—requires reversal of the Special Master's determination here.

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[4] Even in discussing the use of islands merely as headlands, the Court recognized that islands could only rarely be treated as forming any portion of the coast of a juridical bay (394 U.S. at 62–63): "Of course, the general understanding has been—and under the Convention certainly remains—that bays are indentations in the *mainland*, and that islands off the shore are not headlands but at the most create multiple mouths to the bay. In most instances and on most coasts it is no doubt true that islands would play only that restricted role in the delimitation of bays. But much of the Louisiana coast does not fit the usual mold. It is marshy, insubstantial, riddled with canals and other waterways, and in places consists of numerous small clumps of land which are entirely surrounded by water and therefore technically islands." (Emphasis in original; footnotes omitted.)

Thus the Court there permitted the use of islands as headlands only because of the peculiar nature of the Louisiana coast, where islands and mainland are to a large degree indistinguishable as a practical matter. The Special Master gave no similar reasons to justify his far more extensive use of islands as the major defining coastline of a juridical bay.

3. After concluding that Florida Bay is a juridical bay, the Special Master further observed that "the character of this area as inland waters of the State of Florida appears to be conceded by the United States" (Report, p. 39). The United States intended no such concession and believes that it made none. Florida's principal claim with respect to those waters had been that they were a portion of a larger historic bay,[5] and the United States argued extensively in its post-trial brief (pp. 78–109) that there are no historic bays along the coast of Florida. We did not argue the question of juridical bays in that brief, for Florida at trial had seemingly abandoned its original alternative claim of an Article 7 juridical bay. But we had presented evidence at trial which was intended to refute that alternative claim. See Tr. 145–146.

Moreover, our position with respect to the necessary defining characteristics of a juridical bay has been consistently maintained throughout the tidelands litigation in this Court. A bay formed between the mainland coast and a fringe of islands projecting away from that coast can be designated a juridical bay under Article 7 only if either (a) the United States has determined to connect the islands with the mainland by means of straight baselines or (b) the islands are, as a practical matter, largely indistinguishable from the mainland. See *California II, supra*, 381 U.S.

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[5] Such bays have been described by this Court as "bays over which a coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations." *California II, supra*, 381 U.S. at 172.

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at 167–172; *Louisiana Boundary Case, supra,* 394 U.S. at 66–73.

4. But even if it is assumed *arguendo* that Florida Bay satisfies the Article 7 definition of a juridical bay, the Special Master erred in measuring Florida's historic offshore boundary from the 24-mile closing line which he designated for the Bay. Historic boundaries measured from the coastline must be measured from the historic coastline. *United States* v. *Louisiana,* 389 U.S. 155 (*Louisiana III*). At the time Florida's 1868 constitution was adopted, the United States recognized closing lines of no more than two marine leagues. See *Manchester* v. *Massachusetts,* 139 U.S. 240, 258. After a comprehensive review of the history of the subject, the Special Master in the *California II* case concluded that even as late as 1947 "the United States had taken the position that a bay was inland water only if a closing line could be drawn across its mouth less than 10 miles long * * *." 381 U.S. at 163. The longer 24-mile closing line is a creature of the Convention on the Territorial Sea and the Contiguous Zone and was adopted by the United States only upon its ratification of the Convention on March 24, 1961.

Thus even if, contrary to our contention, a juridical bay can be formed out of the upper Florida Keys, its maximum closing line for the purpose of fixing Florida's historic boundary would be two marine leagues in length. Such a closing line would, of course, be considerably to the east of the closing line drawn by the Special Master. Indeed, such a closing line, or even a longer closing line ten miles in length, would

be east of many of the small islands in the Bay and therefore would not affect Florida's historic boundary at all; that boundary would be measured three leagues out from the natural shorelines of those islands rather than from the closing line. Moreover, since the boundary so drawn would at all points lie at least three geographical miles beyond the 24-mile closing line designated by the Special Master, that longer closing line would not be in any way relevant to a determination of Florida's seabed rights under the Submerged Lands Act.[6] In other words, the question whether Florida Bay constitutes a juridical bay should have no bearing on the ultimate disposition of the seabed rights at issue in this case although, for the reasons previously stated (pp. 7–9, *supra*), the question is important because of its international ramifications.

II

ISLAND ARCHIPELAGOS MAY NOT BE ENCLOSED BY CLOSING LINES

1. The Special Master *sua sponte* used closing lines to enclose the narrow waters of each of three island groups—the lower Florida Keys from Money Key to

[6] Florida is granted seabed rights within its historic boundary in the Gulf out to a maximum of three leagues, but is guaranteed a minimum of three miles from its current coastline. 43 U.S.C. 1301(b); *United States* v. *Florida*, *supra*. Where the historic boundary lies more than three miles seaward of the current coastline, the three mile minimum alternative need not be invoked.

Key West, the Marquesas Keys, and the Dry Tortugas Islands. The use of such closing lines has little or no effect on the disposition of seabed rights in this case; there is no substantial difference between Florida's seabed rights as determined by the Special Master, using closing lines as the coastline, and those which would be determined using natural shorelines. However, as in the case of the Special Master's enclosure of Florida Bay, the enclosure of the waters within each of the three outer island groups has such important international ramifications that the United States is constrained to except to the Special Master's finding.

The United States has heretofore treated the narrow waters within these three island groups as territorial seas through which foreign vessels may engage in innocent passage without restriction or interference. By encircling each island group with closing lines, the Special Master converted these territorial seas into inland waters, thus terminating the right of innocent passage. This of course threatens direct interference with foreign navigation and is contrary to the foreign policy position of the United States.

2. The Special Master's finding cannot be justified under the Convention on the Territorial Sea and the Contiguous Zone. Since the narrow waters within these island groups are neither bays nor rivers, their enclosure by use of closing lines would be permitted under the Convention only if they satisfy the requirements for the use of straight baselines. But Article 4 of the Convention allows the use of straight baselines

only "[i]n localities where the coast line is deeply indented and cut into, or if there is a fringe of islands in its immediate vicinity" and specifies that "[t]he drawing of such baselines must not depart to any appreciable extent from the general direction of the coast * * *." See Report, p. 48. The islands here in question—the lower Florida Keys, the Marquesas, and the Dry Tortugas—do not meet these criteria.

Article 4 contemplates the enclosure of inland waters lying between an island chain and the mainland coast, not of waters lying within a group of islands. Moreover, the islands here at issue are not in any event in the immediate vicinity of the mainland; instead, they extend away from the mainland, separating the Atlantic Ocean from the Gulf of Mexico, with the most seaward group, the Dry Tortugas, lying almost 100 miles from the mainland. Furthermore, the closing lines proposed by the Special Master would not follow the general direction of the coast at all; they would completely encircle each of the three island groups without regard to the direction of the mainland coastline.[7]

Moreover, even if these island groups otherwise satisfied the requirements of Article 4, it was not

[7] Finally, whereas Article 4(3) prohibits the construction of straight baselines "to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them" (see Report, p. 48), the Special Master has proposed lines among the "outer islands and low-tide elevations of the group * * *" (Report, p. 53). Nautical charts of these islands show that there are numerous low-tide elevations among them which do not have permanent installations above sea level.

within the jurisdiction of the Special Master to create inland waters through the construction of straight baselines. As in the *Louisiana Boundary Case, supra,* 394 U.S. at 67, "the decision whether to draw such baselines is within the sole discretion of the Federal Government, and the United States has not chosen to do so." And, as this Court further observed in the *Louisiana Boundary Case, supra,* 394 U.S. at 72–73:

> * * * this optional method of establishing boundaries should be left to the branches of Government responsible for the formulation and implementation of foreign policy. It would be inappropriate for this Court to review or overturn the considered decision of the United States * * * not to extend its borders to the furthest extent consonant with international law. [Footnote omitted.]

See, also, *California II, supra,* 381 U.S. at 167–169. The United States has not chosen to construct straight baselines within the island groups at issue, and the Special Master erred in doing so himself.

3. The Special Master's finding, if approved, would embarrass the United States in the conduct of its foreign affairs. The Special Master's use of baselines represents, in a small way, application of an archipelagic principle of enclosure which this nation currently opposes as a violation of international law. Certain island nations, particularly Indonesia and the Philippines, have drawn baselines connecting their outer islands and have claimed the seas thus enclosed as internal or "national" waters; the United States officially opposes such enclosures, because they significantly interfere with our national security and

commercial shipping interests. See Whiteman, *supra,* at 284–285.

The baselines drawn by the Special Master are of course much shorter than those claimed by the major island nations. But the archipelagic principle involved is similar, and its adoption by this Court could prejudice the United States' negotiating position concerning archipelagic regimes in the current Law of the Sea Conference beginning June 20, 1974. Since there are numerous areas around the world with coastal islands where such a principle could be applied by foreign nations, vital navigation and foreign policy interests are at stake.

CONCLUSION

For the foregoing reasons, this Court should determine that the area designated by the Special Master as Florida Bay is not a juridical bay and that the narrow waters within the lower Florida Keys, the Marquesas, and the Dry Tortugas are not enclosed as inland waters by means of straight baselines.

Respectfully submitted.

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